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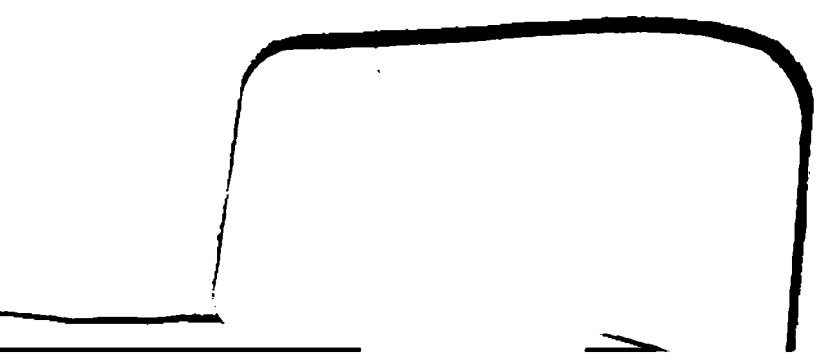
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A TREATISE
ON THE
LAW OF PLEADING AND PRACTICE
UNDER THE
PROCEDURAL CODES

ADAPTED TO USE IN
ALASKA, ARIZONA, CALIFORNIA, COLORADO, HAWAII,
IDAHO, KANSAS, MONTANA, NEBRASKA, NEVADA,
NEW MEXICO, NORTH DAKOTA, OKLAHOMA,
OREGON, SOUTH DAKOTA, UTAH,
WASHINGTON, AND WYOMING

Le mester de counter.—Britt. c. 22.
(The mystery or art of pleading.)

BY
JAMES M. KERR

VOLUME II

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PART IV.

GENERAL FUNDAMENTAL PRINCIPLES AND RULES OF PLEADING IN CIVIL ACTIONS.

CHAPTER I.

GENERAL PRINCIPLES AND RULES.

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§ 704. IN GENERAL. We have already briefly discussed the general fundamental principles of the pleadings, in a civil action, in Part I of this treatise; showing that the pleadings in a cause were originally oral, but are now required to be in writing in all courts of record,¹ and to a certain extent in some courts not of record, in some of the jurisdictions; that the English or common-law system of pleading, which was adopted and followed in the American states,—with the exception of Louisiana, which adopted the civil law system and procedure,—was exceptional;² discussing briefly materiality of issue,³ certainty of issue,⁴ singleness of issue,⁵ duplicity and misjoinder

¹ See, ante, § 13.

² See, ante, § 14.

³ See, ante, § 15.

⁴ See, ante, § 16.

⁵ See, ante, § 17.

of issues,⁶ common-law pleading,⁷ and the formalities of the pleadings at common law,⁸ with their intricacies and defects. It remains now to give a full treatment of the fundamental principles and rules of pleading in those states which have adopted the reformed system of judicature,—either in procedural codes or statutory provisions,—to the extent, and on the plan, outlined in the following section, adopting as the basis of the treatment the California Code of Civil Procedure.

§ 705. AS TO PLAN AND SCOPE. In this, the concluding part of this treatise, will be discussed the broad principles and general fundamental rules of pleading; but, except for a possible illustration of a principle or a general rule now and then, will not enter into the broad field of illustrations of the application of the principles and rules discussed to the various classes of action or subjects of litigation; that work is left for full and detailed development in a treatise which is to follow in due course.

The steps in pleading in a cause are sought to be set out and discussed systematically, and as they occur in the history of a cause, in so far as advantageous treatment will permit of such a presentation. Some things, relating, alike, to various steps in the course of bringing the pleadings up to the point where the issues are said to be “made up,” and the cause ready to be “set” or assigned for trial, may be severed and treated to advantage once for all in a detached and distinct chapter,—e. g., “Verification,” which applies alike to complaints, to answers, to counter-claims, and to supplementary pleadings.

§ 706. DEFINITION OF PLEADINGS. The pleadings in a cause are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court.¹ That is, are the written statements by the par-

⁶ See, ante, § 18.

⁷ See, ante, § 19.

⁸ See, ante, § 20.

¹ Kerr's Cyc. Cal. Code Civ.

ties² to the action of the real facts constituting respectively their claims and defenses,³ eschewing all fictions⁴ and representations,⁵ whether the action is at law or in equity, and whether the issue presented to be determined by the court is one of law or of fact,⁶ and constitute what

Proc., § 420. See *Tucker v. United States*, 151 U. S. 164, 38 L. Ed. 164, 14 Sup. Ct. Rep. 299.

² Oral pleading formerly allowed, now required to be in writing.—See, ante, § 13. See, also, *Wilson v. White*, 84 Cal. 239, 241, 24 Pac. 114; *Waggoner v. Green*, 40 Ill. App. 648; *Hall v. Aetna Mfg. Co.*, 30 Iowa 215; *Handly v. Travis*, Ky. Dec. 138; *Parrish v. Sun Printing & Pub. Co.*, 6 App. Div. (N. Y.) 585, 39 N. Y. Supp. 540; *Bailey v. Wilson*, 1 Bail. L. (8 C.) 15. See *Paxton v. Paxton*, 38 W. Va. 616, 18 S. E. 675.

Counter-claim filed at time of trial, on leave, the trial judge remarking at the time that a demurrer thereto would be sustained when filed, directed the trial to proceed without written pleading to the counter-claim; held not error.—*Veysey v. Barnard*, 49 Wash. 571, 95 Pac. 1096.

In courts not of record pleadings may be oral.—*State ex rel. Stinson v. Murphy*, 41 La. Ann. 526, 6 So. 816 (a city's recorder's court).

In summary proceedings against constable and his sureties for failure to make return, by motion, held sufficient; written declaration not being necessary.—*Condry v. Henley*, 4 Stew. & P. (Ala.) 9.

Issues may be made upon record, in absence of statute requiring written pleadings; the essential thing being that they must ap-

pear on the record of the cause.—*Gwin v. Williams*, 27 Miss. 324.

Oral amendments to pleadings, offered on going to trial, and not reduced to writing, is not proper practice.—*Parrish v. Sun Printing & Pub. Co.*, 6 App. Div. (N. Y.) 585, 39 N. Y. Supp. 540.

Written pleadings can not be dispensed with by consent of the parties.—*Hicks v. Marshall*, 67 Ga. 718.

Compare: *Kelsey v. Lamb*, 21 Ill. 559; *Vider v. Chicago, City of*, 60 Ill. App. 595; *Dewey v. Dupuy*, 2 Watts & S. (Pa.) 553.

³ *Kennett v. Peters*, 54 Kan. 119, 45 Am. St. Rep. 274, 37 Pac. 999; *Caldwell v. Ryan*, 210 Mo. 17, 124 Am. St. Rep. 717, 14 Ann. Cas. 314, 16 L. R. A. (N. S.) 494, 108 S. W. 533.

⁴ Fictions abolished.—See, ante, § 30; also, *Payne v. Treadwell*, 16 Cal. 220, 243; *Kennett v. Peters*, 54 Kan. 119, 45 Am. St. Rep. 274, 37 Pac. 999.

⁵ *Shinloub v. Ammerman*, 7 Ind. 347.

⁶ *Clapp v. Phelps*, 19 La. Ann. 461, 92 Am. Dec. 545; *United States v. Gilmore*, 74 U. S. (7 Wall.) 491, 19 L. Ed. 282.

All the essential facts must be alleged.—*Western Union Tel. Co. v. Mitchell*, 91 Tex. 454, 66 Am. St. Rep. 906, 40 L. R. A. 209, 44 S. W. 274.

Inconsistent defenses not allow

is known as the "record" in the action,⁷ as distinguished from other papers used in the action,—such as affidavits,⁸ motions,⁹ and all statements and papers not entitled to be filed with the court.¹⁰ The object of the pleadings is to narrow the matter to be determined down to a single issue,¹¹ and notify the opposite party what the pleader expects to prove on that issue, so that he may meet and defeat it at the trial;¹² and hence the allegation of facts by the respective parties must be with such certainty and precision as will enable his adversary to prepare for the issue and adduce evidence to meet the state of facts as set forth in the pleadings.¹³

able under Code.—*Seattle Nat. Bank v. Carter*, 13 Wash. 281, 48 L. R. A. 177, 43 Pac. 391; *Hart-Parr Co. v. Keith*, 62 Wash. 464, Ann. Cas. 1912D, 243, 114 Pac. 169.

⁷ *Jones v. Kansas City, Ft. S. & M. R. Co.*, 178 Mo. 528, 101 Am. St. Rep. 434, 77 S. W. 890.

Pleading struck from files is still a part of the record.—*Gregg v. Groesbeck*, 11 Utah 310, 32 L. R. A. 266, 40 Pac. 202.

Record, at common law, consisted of the pleadings, process, verdict and judgment.—*Grover Irr. & Land Co. v. Lovella Ditch, Reservoir & Irr. Co.*, 21 Wyo. 204, Ann. Cas. 1915D, 1207, L. R. A. 1916C, 1275, 131 Pac. 43.

⁸ Affidavits voluntarily given, or documents voluntarily produced, not a part of the "record."—*Tucker v. United States*, 151 U. S. 164, 38 L. Ed. 112, 14 Sup. Ct. Rep. 299.

⁹ See *Littleton v. Burgess*, 16 Wyo. 58, 16 L. R. A. (N. S.) 49, 91 Pac. 832; *Brownfield v. South Carolina*, 189 U. S. 426, 47 L. Ed. 882, 23 Sup. Ct. Rep. 513.

¹⁰ Notice in escheat proceedings, served upon the public administrator, that the state claims the entire estate of the decedent, on specified grounds including the ground that the deceased "died without leaving surviving him any heirs at law or next of kin," has no proper place upon the files of the court, not being the allegation of a fact.—*State ex rel. Attorney-General v. Superior Court*, 148 Cal. 55, 2 L. R. A. (N. S.) 643, 82 Pac. 672.

¹¹ *Tate v. Rasse*, 35 Utah 229, 99 Pac. 1003; *Tate v. Shaw*, 35 Utah 240, 99 Pac. 1007.

See, also, ante, § 17.

Pleading matters to form the issue, and by which party to a cause to be pleaded, as required by the common law, is not changed by the reformed judicature.—*Backus v. Clark*, 1 Kan. 303, 83 Am. Dec. 437.

¹² *Soden v. Murphy*, 42 Colo. 352, 94 Pac. 353.

¹³ As to certainty in pleading, see, ante, § 16.

§ 707. **REFORMED PROCEDURAL PLEADING—DEVELOPMENT OF.** The adoption of the code system of procedure, or its equivalent, by practically all of the western states of the Union is perhaps the greatest testimonial that can be offered to the general efficacy of that system in aid of the prime object of all remedial laws, “the enforcement or protection of rights and the redress or prevention of wrongs,” departing as it does from the formalities¹ and technical rules of the common law,² doing away with feigned and fictitious³ issues,⁴ and presenting the facts in regard to the matter in controversy to be determined in plain and non-technical language,⁵ the reformed procedural pleading introduces into actions at law the directness and simplicity, the spirit and the method, formerly confined alone to suits in equity.⁶ But we have already

¹ All forms of actions are abolished.—See, ante, § 29.

² *Coleman v. Jaggers*, 12 Idaho 125, 118 Am. St. Rep. 207, 85 Pac. 894; *Bates v. Capital State Bank*, 18 Idaho 429, 110 Pac. 277; *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660, 14 Am. Dec. 785; *Seattle Nat. Bank v. Carter*, 13 Wash. 281, 48 L. R. A. 177, 43 Pac. 331; *Morse v. Gilman*, 16 Wis. 504; *Miller v. Boyer*, 94 Wis. 123, 68 N. W. 869; *Ean v. Chicago, M. & St. P. R. Co.*, 95 Wis. 69, 69 N. W. 997; *Miles v. Mutual Reserve Fund Life Ins. Co.*, 108 Wis. 421, 427, 84 N. W. 159, 162; *Emerson v. Nash*, 124 Wis. 369, 109 Am. St. Rep. 944, 70 L. R. A. 326, 102 N. W. 921; *Jones v. Monson*, 137 Wis. 478, 129 Am. St. Rep. 1082, 119 N. W. 179.

Federal courts sitting in states having the reformed system of judicature adopt the reformed rules pleading and practice, unless they contravene the acts of Congress or the rules of the fed-

eral court.—*Teese v. Phelps*, 1 McAll. 17, Fed. Cas. No. 13818.

Federal distinction of actions are abolished, and their character must be determined by the nature of the grievance, rather than the form of the declaration.—*New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785.

“We can not too often recur to the radical change wrought by the Code from the common-law rule for determining the sufficiency of pleadings.”—*Emerson v. Nash*, 124 Wis. 369, 109 Am. St. Rep. 944, 70 L. R. A. 326, 102 N. W. 921.

³ Fictions of the common law are done away with.—See, ante, § 30, and § 706, footnote 4.

⁴ *Kennett v. Peters*, 54 Kan. 119, 45 Am. St. Rep. 274, 37 Pac. 999.

⁵ As to Code pleading generally, its theory and object, see, ante, §§ 22-24.

Facts to be alleged as they exist.—*Payne v. Treadwell*, 16 Cal. 220.

⁶ *Townsend v. Bogert*, 126 N. Y. 307, 22 Am. St. Rep. 385, 27 N. E.

seen that while the technicalities, formalities and fictions of common-law pleading are abolished by the reformed judicature, the remedies formerly prevailing are not abolished,⁷ and neither is the classification of the principles governing the rights and remedies of the parties, dependent upon the nature of the subject-matter of the action and the relief sought.⁸ Actions are still either at law or in equity, *ex contractu* or *ex delicto*,⁹ and real, personal or mixed.¹⁰ The rules prescribed by the reformed procedural codes and statutes working like simplifications, governing the pleadings and procedure in a case, are intended as means, not as ends.¹¹

The pioneer states in procedural reform were compelled to combat not a little of prejudice manifested against all systems of procedure less venerable than that of the common law. While there is much to admire in the common law, still its arbitrary distinctions between forms of action and its encumbering refinements and laborious technicalities did not appeal to those who would strip the law down to the very spirit itself. Happily, the period of probation for the new system of procedure was a brief one, a fact which finds ready explanation in the learning and ability of those great lawyers of the generation which undertook the work of codification.

Many of the original thirteen states still cling to the common-law practice, but most if not all of them have

555, reversing 59 N. Y. Super. Ct. Rep. (27 Jones & S.) 19, 20 N. Y. Civ. Proc. Rep. 262, 12 N. Y. Supp. 461.

⁷ See, ante, §§ 522 et seq.

⁸ Forms of proceeding simplified, but all that is substantial in the body of the law is preserved, to give certainty and logical conclusiveness as a science.—Sampson v. Schaeffer, 3 Cal. 196.

⁹ See, ante, §§ 525, 526.

Procedural codes abolish the dis-

1 Code Pl. and Pr.—61

tinction as to forms of pleading between actions sounding in contract and actions sounding in tort. Relief is administered thereunder without reference to technical rules of the common law.—Lubert v. Chauviteau, 3 Cal. 458, 463, 58 Am. Dec. 415; Jones v. Steamship Cortes, 17 Cal. 487, 79 Am. Dec. 142.

¹⁰ See, ante, § 524.

¹¹ Marshall v. Wentz, 28 Cal. App. 540, 153 Pac. 244.

felt the necessity of establishing rules of procedure modeled upon the lines of the reformed procedural codes. The leaven of the newer system may be said to be working in the body of all our laws, and we are witnessing a gradual relaxation as to the forms and fictions that clogged the efforts of the earlier courts, and a return, if we may so express it, to that rule of pleading which is at once the oldest, the simplest, and the most efficacious: To state the facts constituting the cause of action in ordinary and concise language.¹²

§ 708. PLEADINGS ALLOWED. In California the only pleadings allowed on the part of the plaintiff are:

1. The complaint;
2. The demurrer to the answer;
3. The demurrer to the cross-complaint;
4. The answer to the cross-complaint.¹

The only pleadings allowed on the part of the defendant are:

1. The demurrer to the complaint;
2. The answer;
3. The cross-complaint;
4. The demurrer to the answer to the cross-complaint.²

Other procedural codes have like provisions, some of them, as in Idaho,³ limiting the pleading on the part of the plaintiff to (1) the complaint, and (2) demurrer to the answer; and on the part of the defendant to (1) demurrer to the complaint, and (2) answer.⁴ Some of the other procedural codes provide for a reply to the answer of the defendant.

§ 709. FORMS AND RULES OF PLEADING—HOW PRESCRIBED. In California the forms of pleading in civil actions, and

¹² See *Jury's Adjudicated Forms of Pleading and Practice*, vol. 1, pp. 2 and 3.

¹ *Kerr's Cyc. Cal. Code Civ. Proc.*, 2d ed., § 422; *Consolidated Supp.* 1906-13, p. 1441.

² *Id.*

³ *Idaho Rev. Codes*, § 4162.

⁴ *Nobach v. Scott*, 20 *Idaho* 558, 119 *Pac.* 295.

the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by the code;¹ there being but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs,² whether the action is at law or in equity. Under the procedural codes, while the distinction between the forms of pleading in cases at law and in equity is abolished, the distinction between legal and equitable causes, and the principles governing them, are as well preserved and as sharply defined as before the adoption of the code.³ The abolition of the form of the action does not alter the distinction between actions of law and suits in equity, although both kinds of jurisdiction are cognizable in the same court or tribunal.⁴

§ 710. — ENTITLING PLEADINGS. Under the reformed judicature the form of the action is immaterial; and no particular form of words in the pleading is required.¹ The pleader may make a plain and concise statement of the facts as they exist, and may recover on the facts thus stated whatever damages the law will allow, or secure any other relief the law will award, whether the cause of action arises from contract or from tort, or the action is at law or in equity.² It is not necessary that the pleader shall give to his pleading any particular name or designation;³ if the pleading states a

¹ Kerr's Cyc. Cal. Code Civ. Proc., § 421.

² Id., § 307; *Bowen v. Aubrey*, 22 Cal. 566.

³ See *De Witt v. Hays*, 2 Cal. 463, 469, 56 Am. Dec. 358; *Wiggins v. McDonald*, 18 Cal. 126; *Lux v. Haggin*, 69 Cal. 255, 267, 10 Pac. 674; *Magwire v. Tyler*, 47 Mo. 115, reversed on another point, 84 U. S. (17 Wall.) 253, 21 L. Ed. 576; *Fowles v. Bentley*, 135 Mo. App. 417, 115 S. W. 1090; *Bonesteel v. Bonesteel*, 28 Wis. 245.

⁴ *Beacannon v. Liebe*, 11 Ore. 443, 5 Pac. 273; *Burrage v. Bonanza Gold & Quartz Min. Co.*, 12 Ore. 169, 6 Pac. 766; *Fireman's Fund Ins. Co. v. Oregon R. & Nav. Co.*, 45 Ore. 53, 2 Ann. Cas. 360, 67 L. R. A. 161, 76 Pac. 1075.

¹ *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244.

² *Siminoff v. Goodman & Co. Bank, Jas. H.*, 18 Cal. App. 5, 121 Pac. 939.

³ *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Mastin v. Bar-*

good cause of action or defense the pleading will be sufficient under any of the procedural codes.⁴ It is not what a pleading is called by the pleader that determines its sufficiency for the purpose for which intended, but the facts set forth therein that determines both its sufficiency⁵ and its character.⁶ Thus, the facts alleged will determine whether the pleading is an answer or a cross-complaint;⁷ and it is to be noted that a cross-complaint is in effect simply an answer, and may be treated as such on the trial.⁸ But it has been said that a document filed by the plaintiff styled an "Answer to defendant's cross-complaint" must be disregarded where the defendant has not filed a cross-complaint; and also that such document can not be looked to to help out an insufficient complaint.⁹

§ 711. — FORMALITY OF STATEMENT. It has already been observed that the rules of the procedural codes governing pleading and procedure are merely means to an end, and not ends;¹ and that no particular formality or set words are required in a pleading;² a proper statement of the facts in any form or in any words of the English language, will be sufficient if clearly done and the meaning fully brought out, showing facts necessary to a

tholomew, 41 Colo. 328, 92 Pac. 682; *Patterson v. State*, 10 Ind. 296.

⁴ *Martin v. Bartholomew*, 41 Colo. 328, 92 Pac. 682.

⁵ *McDougald v. Hulet*, 132 Cal. 154, 64 Pac. 278.

⁶ *Meeker v. Dalton*, 75 Cal. 154, 156, 16 Pac. 764; *Gregory v. Bouvier*, 77 Cal. 121, 124, 19 Pac. 232; *Moore v. Superior Court*, 22 Cal. App. 156, 133 Pac. 990; *Thompson v. Voss*, 16 Ind. 297; *Charlotte, C. & A. R. Co. v. Gibbes*, 23 S. C. 370; *Green v. Hughitt School Tp.*, 5 S. D. 452, 59 N. W. 224.

As to determining character of action, see, ante, § 527.

"Answer" raising questions of law only, may be treated as a demurrer, and tried by the court without a jury.—*Charlotte, C. & A. R. Co. v. Gibbes*, 23 S. C. 370.

Designating as a "reply" a pleading in effect a demurrer, is not a material mistake, and leaves no error on the record.—*Thompson v. State*, 16 Ind. 297.

⁷ *Meeker v. Dalton*, 75 Cal. 154, 156, 16 Pac. 764.

⁸ *Rodgers v. Peckham*, 120 Cal. 238, 243, 52 Pac. 483.

⁹ *Carroll v. Gerard Fire Ins. Co.*, 72 Cal. 297, 303, 13 Pac. 863.

¹ See, ante, § 707, footnote 11.

² See, ante, § 710, footnote 1.

recovery or sufficient for a defense.³ The ultimate facts in the case should be concisely alleged, and this is all that is required to be alleged;⁴ but where facts are sufficiently pleaded from which the ultimate facts necessarily result, this will have the same effect as though the ultimate facts were directly pleaded.⁵ Thus, where facts are well stated, or appear by fair intendment, which constitute a cause of action for relief from a judgment, the complaint will be sufficient, notwithstanding the fact that it contains much redundant matter and some of the necessary facts are inaccurately or ambiguously stated, or appear only by necessary implication.⁶ Where a pleading is based on a statute, the pleader should refer to the statute in some general terms, but if he fail to do this, and the pleading is not objected to, the pleading will be sufficient, and the party may show facts bringing him within the statute.⁷

³ *Stanwood v. Sage*, 22 Cal. 516; *Rogers v. Duhart*, 97 Cal. 500, 32 Pac. 570; *Preston v. Central Calif. Water & Irr. Co.*, 11 Cal. App. 190, 104 Pac. 462.

Allegation upon information and belief is sufficient, especially when the matter is peculiarly within the knowledge of the adverse party.—See, post, § 718.

Abbreviations,—e. g. "S/87 wheat,"—do not render pleading unintelligible or meaningless, or to render the pleading ambiguous or uncertain; but they are better written out in full.—See *Berry v. Kowalsky*, 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202.

See, also, post, § 742.

Essential requisite of good pleading is clearness, distinctness, understandability by adverse party, counsel, jury and judge; and

especially is this true in regard to the complaint.—*Preston v. Central Calif. Water & Irr. Co.*, 11 Cal. App. 190, 104 Pac. 462.

"Neighborhood" is an indefinite phrase that should not be used without further description, as it will be strictly construed against the pleader.—*Aliso Water Co. v. Baker*, 95 Cal. 268, 30 Pac. 537.

See, also, post, § 742.

⁴ *Turner v. Reynolds*, 81 Cal. 214, 216, 22 Pac. 546; *Woodroof v. Howes*, 88 Cal. 184, 190, 26 Pac. 111.

Detailed history of the cause and of the evidence, should not be inserted.—*Smith v. Matthews*, 81 Cal. 120, 121, 22 Pac. 409.

⁵ *Osborne v. Clark*, 60 Cal. 622.

⁶ *Anderson v. Bank of Lassen County*, 140 Cal. 695, 74 Pac. 287.

⁷ *Camp v. Wabash R. Co.*, 94 Mo. App. 272, 68 S. W. 96.

§ 712. — SUFFICIENCY OF STATEMENT. A pleading will be sufficient to constitute a cause of action or of defense if it alleges facts sufficient to constitute such cause, without setting out matters tending to prove the facts alleged;¹ thus, an allegation that the plaintiff is the owner in fee-simple of premises described and the subject-matter of the action, is a sufficient averment of title and not a simple conclusion of law.² But where any relief is sought, facts must be pleaded warranting the granting of such relief;³ thus, in an action for relief from a fraudulent sale, the allegations of the complaint must show that the transaction was rescinded, it not being sufficient merely to allege an "offer to return the deed," because this does not show either a rescission or an offer to rescind.⁴ In a suit upon a judgment it is sufficient to allege in the complaint that it remains unpaid and in full force; it is not necessary to allege that no appeal has been taken.⁵ In pleading the determination of a board or officer, under the California procedural code,⁶ it is not necessary to allege the facts conferring jurisdiction on such board or officer, it being sufficient to allege that such determination was duly made;⁷ thus in an action to enforce the lien of a street-paving assessment, it is sufficient,—as against a general demurrer, at least,—to allege that all the several acts required to be done by the city council, superintendent of streets, and by the plaintiff have been duly done and performed, in the manner and at the times and in the form required by law.⁸ To

¹ *Lorenz v. Jacobs*, 2 Cal. Unrep. 296, 3 Pac. 654.

² *Johnson v. Vance*, 86 Cal. 128, 130, 24 Pac. 863.

³ *Sigourney v. Zellerbach*, 55 Cal. 431, 441.

⁴ *Ahrens v. Adler*, 33 Cal. 608.

⁵ *Chaquette v. Ortet*, 60 Cal. 594.

⁶ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 456.

⁷ *Babbcock v. Goodrich*, 47 Cal. 512; *Los Angeles, City of, v. Waldron*, 65 Cal. 283, 3 Pac. 890; *Pacific Paving Co. v. Bolton*, 97 Cal. 8, 31 Pac. 625; *Bituminous Lime Rock Pav. & Imp. Co. v. Fulton*, 4 Cal. Unrep. 151, 33 Pac. 1117.

⁸ *Bituminous Lime Rock Pav. & Imp. Co. v. Fulton*, 4 Cal. Unrep. 151, 33 Pac. 1117.

be sufficient the pleading must state all the facts necessary to constitute a cause of action or defense;⁹ if it fails to do this it will not be sufficient, and where the pleading is thus defective no evidence will be admissible to support it.¹⁰ Thus, in an action upon a contract the facts must be set out—merely incorporating the recitals in the contract will not be sufficient;¹¹ and where the consideration is alleged to be illegal, the facts showing that fact must be set out.¹² In an action on a claim of money due, it is insufficient simply to allege that there is now due and owing to the plaintiff from the defendant a specified amount of money; the circumstance out of which the debt arose,—the facts in the case,—should be alleged, and a further averment of nonpayment.¹³ In an action upon assigned claims for goods and merchandise sold and furnished, and for labor performed and services rendered, an allegation of the facts under which the indebtedness in each claim arose, at the special instance and request of the defendant; that each claim was assigned to the plaintiff before suit, who thus became and still is the owner and holder thereof, and that no part of any of the claims have been paid although demand for payment has been duly made, is sufficient to state a good cause of action,¹⁴ although it does not allege an express promise by the defendant to pay any sum for the goods or for the labor or services,¹⁵—which a careful pleader will not omit to allege. This doctrine rests upon the ground that where goods are received by a person or services rendered to him, and of which he had had the use and en-

⁹ See footnote 1, this section.

¹⁰ *Harron, Rickard & McCone v. Wilson, Lyon & Co.*, 4 Cal. App. 488, 88 Pac. 512.

¹¹ *Hayt v. Bentel*, 164 Cal. 680, 130 Pac. 432.

¹² *Moffatt v. Bulson*, 96 Cal. 106,

31 Am. St. Rep. 192, 30 Pa. St. 1022.

¹³ *Ryan v. Holliday*, 110 Cal. 335, 42 Pac. 891.

¹⁴ *Krieger v. Feeny*, 14 Cal. App. 538, 112 Pac. 901.

¹⁵ *Id.*

joyed the benefit, a promise is implied in law to pay or give a consideration therefor.¹⁶

§ 713. — **MATTERS JUDICIALLY NOTICED.** Matters of which the courts take judicial notice are not required to be pleaded;¹ such as general customs,² not only because the courts take judicial notice thereof, but also because they are presumed to have entered into the contract and to bind the parties;³ or a holiday⁴ declared by the governor;⁵ that a season's cropping and harvesting includes the month of April;⁶ the dangerous character of a substance generally known as explosive;⁷ organization of counties and townships for judicial purposes, the succession of townships and their liability for indebtedness;⁸ and the like.⁹

§ 714. — **MATTERS OF CONCLUSION—OF THE PLEADER.** Under the procedural codes pleaders are required to set forth the ultimate facts, or facts from which the ultimate facts are necessarily inferred,¹ not the conclusion of the

¹⁶ *McFarland v. Holcomb*, 123 Cal. 84, 55 Pac. 761; *Krieger v. Feeny*, 14 Cal. App. 538, 112 Pac. 901.

¹ *French v. Senate of California*, 146 Cal. 604, 2 Ann. Cas. 756, 69 L. R. A. 556, 80 Pac. 1031.

² Claimant of water rights under appropriation on United States public domain, need not plead custom of appropriation of waters, as courts will take judicial notice of that fact.—*Parkersville Drainage Dist. v. Wattler*, 48 Ore. 332, 86 Pac. 775.

³ *John O'Brien Lumber Co. v. Wilkinson*, 123 Wis. 272, 101 N. W. 1050.

⁴ See *Mullan v. State*, 114 Cal. 578, 46 Pac. 670; *French v. Senate of California*, 146 Cal. 604, 2 Ann.

Cas. 756, 69 L. R. A. 556, 80 Pac. 1031.

See *Kerr's Cyc. Cal. Code Civ. Proc.*, § 1875.

⁵ *Poheim v. Meyers*, 9 Cal. App. 31, 35, 98 Pac. 65.

⁶ *McGillivray v. Miller*, 3 Cal. App. 188, 84 Pac. 778.

⁷ *Patterson v. Standard Oil Co.*, 55 Ore. 511, Ann. Cas. 1912A, 625, 106 Pac. 337.

⁸ *Garfield Township v. Samuel Dodsworth Book Co.*, 9 Kan. App. 752, 58 Pac. 565.

⁹ Incorporation of cities required by statute to be taken judicial notice of by courts, incorporation need not be alleged.—*Green v. Tidball*, 26 Wash. 338, 55 L. R. A. 879, 67 Pac. 84.

¹ See, ante, § 711; *Hitchcock v. Rooney*, 171 Cal. 285, 152 Pac. 913.

pleaders or of the parties.² A pleading that sets forth no facts as the basis for the conclusion pleaded, states no cause of action or defense.³ Thus, a simple allegation of fraud is a mere conclusion of the pleader, unless he sets forth the facts and circumstances disclosing the fraud charged,⁴ and where these facts and circumstances are not set out the charge will be disregarded.⁵

² *Snow v. Halstead*, 1 Cal. 359; *Pryce v. Jordan*, 69 Cal. 569, 571, 11 Pac. 185; *Welthoff v. Murray*, 76 Cal. 508, 510, 18 Pac. 435; *Woodward v. State ex rel. Thomsen*, 58 Neb. 598, 79 N. W. 164; *Wabaska Electric Co. v. Wymore*, City of, 60 Neb. 199, 82 N. W. 626; *State ex rel. Young v. Osborn*, 60 Neb. 415, 83 N. W. 357; *State v. Tanner*, 73 Neb. 104, 102 N. W. 235; *State v. Brimmer*, 73 Neb. 121, 102 N. W. 121; *State v. Bednar*, 73 Neb. 122, 102 N. W. 241; *State v. McCright*, 73 Neb. 123, 102 N. W. 241; *Long v. Dufur*, 58 Ore. 162, 113 Pac. 59.

³ CAL.—*Levison v. Schwartz*, 22 Cal. 229; *Aurrecoechea v. Sinclair*, 60 Cal. 532, 539; *Coffey v. Greenfield*, 62 Cal. 602; *Johnson v. Kirby*, 65 Cal. 482, 4 Pac. 458; *People v. Otto*, 77 Cal. 45, 49, 18 Pac. 869; *Wilhoit v. Cunningham*, 87 Cal. 453, 458, 25 Pac. 675; *Ohm v. San Francisco, City of, etc.*, 92 Cal. 437, 28 Pac. 580; *McConoughey v. Jackson*, 101 Cal. 265, 40 Am. St. Rep. 53, 35 Pac. 863; *Shea v. Robinson*, 101 Cal. 455, 35 Pac. 1023; *Jones v. Sanders*, 138 Cal. 405, 71 Pac. 506. COLO.—*Gale v. James*, 11 Colo. 540, 19 Pac. 446. IDAHO—*Swanholm v. Reeser*, 3 Idaho 476, 31 Pac. 804. N. D.—*Houghton Implement Co. v. Vavrousky*, 15 N. D. 308, 109 N. W. 1024.

⁴ ARIZ.—*Cochise County v. Copper Queen Consol. Min. Co.*, 8 Ariz. 221, 71 Pac. 946. CAL.—*Fox v. Dyer*, 3 Cal. Unrep. 139, 22 Pac. 257; *Albertoli v. Brahma*, 80 Cal. 631, 13 Am. St. Rep. 200, 23 Pac. 404; *People ex rel. Searce v. Glenn County*, 100 Cal. 419, 38 Am. St. Rep. 305, 35 Pac. 302; *Fox v. Hale & Norcross Silver-Min. Co.*, 5 Cal. Unrep. 980, 53 Pac. 32; *Peckham v. Watsonville, City of*, 138 Cal. 242, 71 Pac. 169; *Mulcahy v. Hibernia Savings & L. Soc.*, 144 Cal. 219, 77 Pac. 910. COLO.—*Burdsall v. Waggoner*, 4 Colo. 256. IOWA—*Cowell v. City Water Supply Co.*, 130 Iowa 671, 105 N. W. 1016. KAN.—*Gleason v. Wilson*, 48 Kan. 500, 29 Pac. 698. MONT.—*State ex rel. Crawford v. Minnesota & M. Land & Imp. Co.*, 20 Mont. 198, 50 Pac. 420. NEB.—*Kemper, Hundley & McDonald Dry-Goods Co. v. Renshaw*, 58 Neb. 513, 78 N. W. 1071. N. D.—*Van Dyke v. Doherty*, 6 N. D. 263, 69 N. W. 200. WASH.—*West Coast Grocery Co. v. Stinson*, 13 Wash. 255, 43 Pac. 35; *Cade v. Head Camp, Pacific Jurisdiction, Woodmen of World*, 27 Wash. 218, 67 Pac. 603. WIS.—*New Bank of Eau Claire v. Kleiner*, 112 Wis. 287, 87 N. W. 1090.

⁵ *Peckham v. Watsonville, City of*, 138 Cal. 242, 71 Pac. 169.

Illustrations showing some applications of the above rules, without any attempt at exhaustion or selection, may be advantageous. Thus, it is held that an allegation in a complaint that one is possessed of property by virtue of a deed is a mere conclusion;⁶ allegation of priority in appropriation of water, without allegation of facts showing diversion and application to a beneficial use, merely a conclusion;⁷ allegation that certain demands are not lawful, are not allowed by law, are in excess of amount legally due, and are claimed under unconstitutional legislation, are mere conclusions when not supported by a recital of facts;⁸ allegation plaintiff authorized to find a purchaser for defendant's property, is a mere conclusion;⁹ allegation plaintiff succeeded to and became the owner of certain lands at a specified time, and has ever since been and now is the legal owner thereof, is a mere conclusion;¹⁰ averment assessment on stock of a corporation void, a mere conclusion;¹¹ averment of undue influence, a mere conclusion without facts supporting it;¹² averment that an act has been duly performed is mere conclusion, where facts not set forth, but has been said to be sufficient, in the absence of objection, to authorize admission of evidence to establish it;¹³ denial of indebtedness without denial of the facts in the complaint, a mere conclusion which does not raise an issue;¹⁴ alleging granting of extension of time on good and sufficient consideration, without any facts, a mere conclusion;¹⁵ general allegation of indebtedness, a mere conclusion, and insuffi-

⁶ *Street v. Sederburg*, 41 Colo. 128, 92 Pac. 29.

⁷ *High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 4 L. R. A. 767, 21 Pac. 1028.

⁸ *Callahan v. Broderick*, 124 Cal. 80, 56 Pac. 782.

⁹ *Olney v. Bishop*, 13 Ariz. 336, 114 Pac. 559.

¹⁰ *Schoonow v. Brinbaum*, 148 Cal. 548, 83 Pac. 999.

¹¹ *Johnson v. Kirby*, 65 Cal. 482, 4 Pac. 458.

¹² *Kelly v. Perrault*, 5 Idaho 221, 48 Pac. 45.

¹³ *Pacific Pav. Co. v. Diggins*, 4 Cal. App. 240, 87 Pac. 415.

¹⁴ *Curtis v. Richards*, 9 Cal. 33; *Swanholm v. Reeser*, 3 Idaho 476, 31 Pac. 804.

¹⁵ *Winne v. Colorado Springs Co.*, 3 Colo. 155.

cient.¹⁶ A bill to set aside “a certain pretended confession of judgment” must state the facts by which the court may judge whether the confession was fraudulent or not.¹⁷ A breach of contract regarding working of a mine charged, an allegation that the defendant had not prosecuted the working and development of the mining claims within its means and resources, is a mere conclusion.¹⁸ In a suit on an official bond, an allegation that the defendant officer was acting in the line of his duty and under color of law, is a mere conclusion.¹⁹ Stating that on a certain day the plaintiff filed in the surveyor-general’s office his application and affidavit in due form, for the purchase of state lands, is a mere conclusion.²⁰

§ 715. ——— LEGAL CONCLUSIONS. The legal conclusion deducible from the facts stated are to be drawn by the court and not by the pleader;¹ where drawn by the pleader are not admitted by demurrer;² and in testing the sufficiency of the pleading such conclusions of the pleader must be disregarded.³ The reason for these rules is the fact that the legal conclusions deducible from the facts averred constitute no part of the allegations to constitute a cause of action or defense;⁴ yet a pleading otherwise sufficient will not be bad merely because it unnecessarily states the conclusions of law to be drawn by the court from the facts stated;⁵ and a conclusion of

¹⁶ Fox v. Monahan, 8 Cal. App. 707, 97 Pac. 765.

¹⁷ Pehrson v. Hewitt, 79 Cal. 594, 21 Pac. 951.

¹⁸ Mallory v. Globe-Boston Copper Min. Co., 11 Ariz. 296, 94 Pac. 1116.

¹⁹ People v. Pacific Surety Co., 50 Colo. 273, 109 Pac. 961.

²⁰ McEntee v. Cook, 76 Cal. 187, 18 Pac. 258.

¹ Hubbell v. Hubbell, 7 Cal. App. 661, 95 Pac. 664; Schmidt v. Papillion, Village of, 92 Neb. 511, 138 N. W. 725.

² Branham v. San Jose, City of, 24 Cal. 585; Johnson v. Kirby, 65 Cal. 482, 4 Pac. 458; McConoughey v. Jackson, 101 Cal. 265, 40 Am. St. Rep. 53, 35 Pac. 863.

³ Kruse v. Johnson, 87 Neb. 694, 127 N. W. 1072.

⁴ Pryce v. Jordan, 69 Cal. 569, 571, 11 Pac. 185; Welthoff v. Murray, 76 Cal. 508, 510, 18 Pac. 435.

⁵ Nourse v. Weitz, 120 Iowa 708, 95 N. W. 251; Tisdale v. Ward County, 20 N. D. 401, 127 N. W. 512.

law stated in a pleading which is not justified by the facts set out, will be disregarded as irrelevant and nugatory.⁶ Thus, when the facts alleged show that a statement set out was false, it need not be expressly averred that it was false,⁷ it being unnecessary to plead the legal conclusions to be drawn therefrom.⁸ A promise to pay money, where no day is fixed for payment, may be pleaded as made, without alleging that the promise was to pay on demand, because in law a promise to pay without fixing a day on which such payment is to be made is a promise to pay on demand.⁹ Again, where a complaint alleges that the plaintiff owned certain property, and that on a specified date the defendant took away the property and detains it against sureties and pledgees, need not in terms aver that the detention is unjust, where the statute makes it unjust to detain the property of another against sureties and pledgees; the conclusion that the act complained of was unjust will be drawn by the court.¹⁰

Illustrations of conclusions of law, where facts not pleaded. Allegation of ownership, where chain of title is set forth,¹¹ or an averment that there is now due and owing;¹² that a conveyance was made to hinder and delay and defraud creditors;¹³ that an assessment for street-improvement was not made in the manner and form prescribed by law;¹⁴ that deed sought to be enjoined will create a cloud upon the title;¹⁵ that defendant's debt is

⁶ *Griggs v. St. Paul, City of*, 9 Minn. 246.

⁷ *Homire v. Rodgers*, 74 Iowa 395, 37 N. W. 972.

⁸ See authorities in footnote 1, this section.

⁹ *Chamberlain v. Tyner*, 31 Minn. 371, 18 N. W. 97.

¹⁰ *Adams v. Corrison*, 7 Minn. 456.

¹¹ *Cheda v. Bodkin*, 173 Cal. 7, 158 Pac. 1025.

¹² *Ryan v. Holliday*, 110 Cal. 335, 42 Pac. 891.

¹³ *Beswick v. Dorris*, 174 Fed. 502.

¹⁴ *Beckett v. Morse*, 4 Cal. App. 228, 87 Pac. 408.

¹⁵ *Schuyler v. Broughton*, 65 Cal. 252, 3 Pac. 870.

barred by discharge in insolvency,¹⁶ that defendant voluntarily made and entered into a bond;¹⁷ that it was the duty of the defendant to construct an elevator, in which a personal injury occurred, in a particular manner;¹⁸ that lands were not charged with their just proportion of assessment, nor the proper proportion of cost of reclamation, in an action to annul the assessment of a reclamation district;¹⁹ that money is due;²⁰ that a municipal body had power to make a mortgage;²¹ that note or contract was executed without any consideration whatever;²² that representations were false and untrue in every material respect;²³ that telegraph company operated solely by virtue of a federal franchise, and that it had no franchise from the state, in an action to recover taxes alleged to have been illegally assessed, erroneous conclusions of law;²⁴ denial defendants became or were lawfully bound by a judgment pleaded in complaint;²⁵ denial plaintiff has complied with lien law;²⁶ denial that plaintiffs, or either of them, are competent to sue;²⁷ denial that the sum alleged is now due and owing on a note;²⁸ general

¹⁶ *Christy v. Dana*, 34 Cal. 548; *Christy v. Dana*, 42 Cal. 174; *Drew v. Pedlar*, 87 Cal. 443, 450, 22 Am. St. Rep. 257, 25 Pac. 749.

¹⁷ *Miles v. Baley*, 170 Cal. 151, 149 Pac. 45.

¹⁸ *Cole v. Gladding*, 166 Cal. 354, 136 Pac. 289.

¹⁹ *Spurrier v. Reclamation Dist.*, 172 Cal. 157, 155 Pac. 840.

²⁰ *Frisch v. Caler*, 21 Cal. 71; *Ryan v. Holliday*, 110 Cal. 335, 42 Pac. 891.

²¹ *Branham v. San Jose, City of*, 24 Cal. 585.

²² *Rivera v. Cappa*, 29 Cal. App. 497, 156 Pac. 1017; *Sac County v. Hobbs*, 72 Iowa 69, 33 N. W. 368.

²³ *Woodson v. Winchester*, 16 Cal. App. 472, 117 Pac. 565.

²⁴ *Postal Telegraph-Cable Co. v. Los Angeles, City of*, 164 Cal. 156, 128 Pac. 19.

²⁵ *People ex rel. Central Pac. R. Co. v. San Francisco Board of Supervisors*, 27 Cal. 655.

²⁶ *Curnow v. Happy Valley Blue Gravel & Hydraulic Co.*, 68 Cal. 262, 266, 9 Pac. 149.

²⁷ *Chamberlain Banking House v. Noyes*, 3 Neb. Unof. 550, 92 N. W. 175.

²⁸ *Pacific Coast Mail Order House v. Stillens*, 29 Cal. App. 613, 157 Pac. 539.

Mere denial of indebtedness is not a well pleaded defense (*Thorn v. Hambleton*, 149 Iowa 214, 128 N. W. 393) being merely the denial of a conclusion of law.—*Freeman v. Curran*, 1 Minn. 169.

allegation as to menace, compulsion and coercion,²⁹ or of indebtedness.³⁰

Facts and circumstances must always be pleaded, to be sufficient.

§ 716. — PLEADING ACCORDING TO LEGAL EFFECT. In pleading under the procedural codes it is sufficient to aver the facts according to the legal effect without going into details;¹ but the facts must be alleged directly and not inferentially.² Thus, in alleging a levy under an execution, it is sufficient to aver that the execution was levied upon designated property, without stating the specific acts constituting the levy.³ The conditions precedent⁴ to the enforcement of liability on a contract, and mere conditions of fact not going to the foundation of the cause of action, may be stated according to their legal effect, without setting out the particulars, subject, however, to a motion to make more definite and certain.⁵ In those cases in which there are matters of mixed law and fact, but the ultimate of which is, in a broad sense, a fact, such mixed matters of law and fact may be pleaded according to their legal effect.⁶ It has been said to be sufficient to charge that a railroad company negligently and wrongfully struck and killed stock on its right of

²⁹ Hanford Gas & Power Co. v. Hanford, City of, 163 Cal. 108, 124 Pac. 727.

³⁰ Fox v. Monahan, 8 Cal. App. 707, 97 Pac. 765.

¹ Rohrer v. Turrill, 4 Minn. 407; First Nat. Bank v. Rogers, 13 Minn. 407, 97 Am. Dec. 239; Jones v. Great Northern R. Co., 12 N. D. 343, 97 N. W. 535; South Milwaukee Co. v. Murphy, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583; Schmidt v. Joint School Dist., 146 Wis. 635, 132 N. W. 583.

Unnecessary to state legal ef-

fect of facts fully pleaded.—Rockhill County Club Co. v. Nix (Tex. Civ. App.), 198 S. W. 155.

² Moulton v. Doran, 10 Minn. 67.

³ Rohrer v. Turrill, 4 Minn. 407; First Nat. Bank v. Rogers, 13 Minn. 407.

⁴ As to conditions precedent to right of action, see, ante, §§ 487-494.

⁵ South Milwaukee Co. v. Murphy, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583.

⁶ Schmidt v. Joint School Dist., 146 Wis. 635, 132 N. W. 583.

way or on its track;⁷ but the general rule is that in such cases the facts in the case can not be pleaded by their ultimate effect, the specific acts constituting the negligent or wrongful act complained of should be specifically set out.⁸

§ 717. — PLEADING MATTERS OF EVIDENCE. Under the reformed judicature the pleadings, in so far as they contain affirmative allegations, should be confined to a plain, direct and clear statement of the ultimate facts upon which the cause of action or defense is based, and should not set forth the evidence by which those ultimate facts are to be established or sustained;¹ and a pleading, or an amendment to a pleading, which simply presents evidentiary matters, is vulnerable to demurrer, and is properly stricken out.² In other words, the pleading should set forth the matters to be proved by the party to maintain his cause of action or defense, and not the evidence by which he expects to establish that cause or defense before

⁷ Jones v. Great Northern R. Co., 12 N. D. 343, 97 N. W. 535.

⁸ McPherson v. Pacific Bridge Co., 20 Ore. 486, 26 Pac. 560.

¹ CAL.—Bowen v. Aubrey, 22 Cal. 566; Lorenz v. Jacobs, 2 Cal. Unrep. 296, 3 Pac. 654; Cragg v. Los Angeles Trust Co., 154 Cal. 663, 16 Ann. Cas. 1061, 98 Pac. 1063. COLO.—Rio Grande Southern R. Co. v. Colorado Fuel & Iron Co., 41 Colo. 3, 91 Pac. 1114. IDAHO—Carscallen v. Couer d'Alene & St. Joe Transp. Co., 15 Idaho 444, 16 Ann. Cas. 544, 98 Pac. 622. IOWA—Brainard v. Simmons, 58 Iowa 464, 9 N. W. 382, 12 N. W. 484; Leasure v. Bole, 142 Iowa 248, 120 N. W. 643. MICH.—Hubbard v. McNoughton, 43 Mich. 220, 38 Am. Rep. 176, 5 N. W. 293. MINN.—Lovering v. Webb Pub. Co., 106 Minn. 62, 118

N. W. 61; Burgett v. Wisconsin Cent. R. Co., 109 Minn. 216, 123 N. W. 411. NEB.—Coquillard v. Hovey, 23 Neb. 622, 8 Am. St. Rep. 134, 37 N. W. 479. OKLA.—Guthrie, City of, v. Finch, 13 Okla. 496, 75 Pac. 288.

In action for conversion plaintiff need not set out nature of interest in property; that is a matter of evidence.—Williams v. Roper, 67 Mich. 427, 34 N. W. 890.

² McCaughey v. Schuette, 117 Cal. 223, 59 Am. St. Rep. 176, 46 Pac. 666, 48 Pac. 1088; Ahlers v. Smiley, 11 Cal. App. 343, 104 Pac. 997; Stewart v. Anderson, 111 Iowa 329, 82 N. W. 770; Kelly v. Fejvary, 111 Iowa 693, 83 N. W. 791; Bennett v. Lutz, 119 Iowa 215, 93 N. W. 288.

Complaint containing evidentiary facts as well as the ultimate facts

the court;³ and where evidentiary facts pleaded, if admitted as true, would establish a prima facie cause or defense as disclosed by the ultimate or pleadable facts, such incorporation of evidentiary facts in the pleading can not take the place of the necessary allegation of the ultimate facts to be put in issue;⁴ neither will incompetent testimony be rendered competent by being set out in the pleading, even though the opposing party fails to object and move that it be stricken from the pleading.⁵

Illustrations of the application of the foregoing rules are found in the pleading of an assignment of a ferry franchise, in which it is not necessary to aver the consent of the board of county commissioners, for, if that consent is necessary, it is merely a matter of proof;⁶ declaring on a contract of guaranty, complaint should not include letters from the guarantors, as they are merely matters of evidence;⁷ but in a case in which letters between the parties constitute the contract of purchase and sale, and fix the price to be paid, they are properly incorporated in the complaint,⁸—though it is not good pleading to do so; the facts of the contract should be alleged and the

of the issue, is good only for what the evidence proves.—*Ohm v. San Francisco, City, etc.*, 3 Cal. Unrep. 314, 25 Pac. 155.

Conversation tending to show an intention to treat a provision in a building contract relating to damages for a failure to complete the building within the time contracted, as a penalty and not liquidated damages, properly stricken out as evidentiary and not fact.—*Kelly v. Fejervary*, 111 Iowa 693, 83 N. W. 791.

Evidence not permitted to be pleaded by a party.—*Leasure*, 142 Iowa 248, 120 N. W. 643.

Exception in case of a reply, where allowed by the procedural code, which may state evidentiary

facts tending to establish the ultimate facts stated in the complaint.—*Hudelson v. First Nat. Bank*, 56 Neb. 247, 76 N. W. 570.

³ *Brainard v. Simmons*, 58 Iowa 464, 9 N. W. 382, 12 N. W. 484.

Evidentiary facts need not be alleged; they may be proved and an allegation of the ultimate facts in issue.—*Watchumna Water Co. v. Pogue*, 151 Cal. 105, 90 Pac. 362.

⁴ *Harris v. Hillegass*, 54 Cal. 463.

⁵ *Ireton v. Ireton*, 59 Kan. 92, 52 Pac. 74.

⁶ *Fortain v. Smith*, 114 Cal. 494, 46 Pac. 381.

⁷ *Coquillard v. Hovey*, 23 Neb. 622, 8 Am. St. Rep. 134.

⁸ *Jaques v. Daines*, 3 Neb. Unof. 752, 92 N. W. 570.

letters used merely as evidence to establish the ultimate facts alleged. Intent being material, it may be directly alleged, without setting out the evidentiary facts showing intent.⁹ Negligence being properly alleged, from which a personal injury resulted, it is not necessary to set out the facts establishing the negligence.¹⁰ In an action to recover back illegal taxes paid, it is sufficient to allege that they were unjust, disproportioned and unequal, without stating the particulars in which they were so.¹¹

§ 718. — PLEADING FACTS WITHIN KNOWLEDGE OF OTHER PARTY. The reason for the rule under procedural codes that the pleading shall be definite and certain in its allegations to the end that it may inform the opposite party of the exact issue involved and enable him to produce evidence to meet or overcome it, ceases to exist in those cases in which the facts are peculiarly within the knowledge of the party against whom they are sought to be pleaded, and not accessible to the party pleading, in which case an allegation of the facts may be dispensed with; but this may not be done without showing in the pleading that such facts are peculiarly within the knowledge of the opposite party and not accessible to the pleader.¹ And when the facts sought to be pleaded

⁹ Wilcox v. Davis, 4 Minn. 197.

¹⁰ Cristanelli v. Saginaw Min. Co., 154 Mich. 423, 117 N. W. 910.

¹¹ Guy v. Washburn, 23 Cal. 111.

¹ ALA.—Louisville & N. R. Co. v. Wilson, 162 Ala. 588, 50 So. 188; Birmingham R., Light & P. Co. v. Mosely, 164 Ala. 111, 51 So. 424; Alabama Great Southern R. Co. v. Flinn (Ala.), 74 So. 246. IND.—Brashear v. Madison, City of, 142 Ind. 685, 33 L. R. A. 474, 42 N. E. 349; Singer Sewing Machine Co. v. Phipps, 49 Ind. App. 116, 94 N. E. 793; Jackson Hill Coal & Coke Co. v. Van Henternyak (Ind. App.), 120 N. E.

664. LA.—Dotson v. Louisiana Cent. Lumber Co. (La.), 80 So. 205. N. Y.—Griswold v. National Ins. Co., 3 Cow. 96; Van Rensselaer v. Jones, 2 Barb. 643. FED.—Hammer v. Kaufman, 2 Bond 1, Fed. Cas. No. 5997.

Facts more in defendant's knowledge than plaintiff's need not be alleged with the same particularity required in other cases.—Birmingham R. Light & P. Co. v. Mosely, 164 Ala. 111, 51 So. 424.

Facts not ascertainable by plaintiff, the law sometimes establishes a presumption of their existence and shifts to the defendant the

are presumed to be peculiarly within the knowledge of the opposite party the same definiteness and certainty required under the general rule are dispensed with, and the opposite party will not be heard to complain that the allegations are ambiguous.²

Illustrations of the doctrine above laid down are found in the case of master and servant³ and principal and agent, for the extent of an agent's powers is a matter peculiarly within the knowledge of the principal, and need not be alleged;⁴ and in an action by a servant against his master for a personal injury, it is not necessary to set out in the complaint facts peculiarly within the latter's knowledge.⁵ An owner of property, having personal knowledge of work done and improvements made thereon, in an action to foreclose a mechanics' lien, can not avail himself of a demurrer upon the ground that the description of the work, for which the lien is claimed, is ambiguous, where it is apparent that he can have no doubt as to its meaning.⁶ In an action for a loss on a policy of fire insurance, where the date on which the policy was issued or became effective can be learned from papers on file with the insurance company only, it is sufficient for the complaint to allege the date as "some day prior to" the loss.⁷

burden of showing their non-existence. — *Dotson v. Louisiana Cent. Lumber Co.* (La.), 80 So. 205.

Facts supposed within knowledge of defendant, constituting plaintiff's cause of action, but not within plaintiff's knowledge, less particularity is necessary in the complaint than would otherwise be required. — *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 643.

Party peculiarly conversant with facts required to allege and prove them. — *Alabama Great Southern R. Co. v. Flinn* (Ala.), 74 So. 246.

² *Doe v. Sanger*, 78 Cal. 150, 152, 20 Pac. 366; *Bryan v. Abbott*, 131 Cal. 222, 63 Pac. 363; *Schaafe v. Eagle Automatic Can Co.*, 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759.

³ See footnote 5, this section.

⁴ *Singer Sewing Machine Co. v. Phipps*, 49 Ind. App. 116, 94 N. E. 793.

⁵ *Jackson Hill Coal & Coke Co. v. Van Henternyak* (Ind. App.), 120 N. E. 664.

⁶ *Bryan v. Abbott*, 131 Cal. 222, 224, 63 Pac. 363.

⁷ *Hartford Fire Ins. Co. v. King*, 106 Ala. 519, 17 So. 707.

*Where facts are a matter of public record, they can not be said to be peculiarly within the knowledge of either party; thus, where sales are made by an agent to a county, and therefore a matter of public record, they are not matters peculiarly within the knowledge of the agent.*⁸

§ 719. — PLEADING FACTS NOT WITHIN KNOWLEDGE OF PLEADER. The doctrine laid down in the preceding section applies with particular force to those matters and facts which are not, in the nature of the case, within the knowledge of the person pleading. Thus, an agent called on to account for money of his principal is not presumed to have a personal knowledge of the matter, and may plead in accordance with the doctrine of the preceding section.¹

§ 720. — PLEADING MATTERS OF RECORD. Where matters of record are sought to be pleaded, it must be done in such a manner as to set forth every material and essential fact or matter; but it is those matters, only, which appertain to the record sought to be adduced that require to be so set out; steps leading up to the record need not generally be pleaded.¹ Thus, in an action to foreclose a lien for a public improvement,—e. g., sewer-work done on the property of the defendant,—the complaint must allege not only that the warrant, diagram and assessment were filed and recorded, but must also specify the date

⁸ *Lincoln School Twp. v. Union Trust Co.*, 36 Ind. App. 113, 117, 73 N. E. 623, 74 N. E. 272.

¹ *Hildreth v. Ayre & Lord Tie Co.*, 32 Ky. L. Rep. 1212, 108 S. W. 255.

¹ Tax-lien sought to be foreclosed, it is not necessary for the pleader to set out in the complaint the assessment-rolls, ordinances, and other proceedings leading up to the levy of the tax; those matters are of public record, and be-

ing evidentiary in character (see, ante, § 717), do not require to be pleaded.—*Port Townsend, City of, v. Trumbull*, 40 Wash. 386, 82 Pac. 715. See *Ferry v. Kings County*, 2 Wash. St. 337, 26 Pac. 537.

But facts must be set up showing that the tax was duly imposed on the property; otherwise it will not be sufficient to plead the facts by their legal effect (see, ante, § 716).—*Carter v. Koezley*, 22 N. Y. Super. Ct. Rep. (9 Bosw.) 583, 14 Abb. Pr. 147.

when recorded, because the time of recording is a material fact in the cause; from that date the court is enabled to ascertain whether the action was duly commenced within the life of the lien. For this reason the date of the recording comes within the well-known rule of pleading requiring all the material facts to be recited with certainty.² In those cases in which the pleader seeks to set forth the existence of a record in a court of general jurisdiction, the allegation must be specific and certain, and not made upon information and belief.³ If such record be a judgment upon which it is sought to base a cause of action or defense, it should be alleged to have been duly given,⁴ to be in full force and effect, and not appealed from. It is well always to give volume and page of public records of any character.

§ 721. — PLEADING WRITTEN INSTRUMENT. Under the California procedural code and practice, and elsewhere, a written instrument upon which a cause of action or a defense is founded may be pleaded in either of three ways: (1) By setting forth its substance according to its legal effect; (2) by setting out the instrument in *hæc verba*, that is, by incorporating a copy thereof in the body of the pleading; or (3) by attaching to the pleading a copy thereof as an exhibit, with a proper reference thereto in the body of the pleading.¹ Where a written

² *Williamson v. Joyce*, 137 Cal. 151, 69 Pac. 980.

³ *First Nat. Bank v. Watt*, 7 Idaho 510, 64 Pac. 223.

⁴ *Tuttle v. Robinson*, 91 Hun (N. Y.) 187, 36 N. Y. Supp. 346.

See *Kerr's Cyc. Cal. Code Civ. Proc.*, § 456; also, post, § 724.

As to pleading according to legal effect, see, ante, § 716.

"Obtained" held to be a sufficient allegation under the Kentucky Civil Code, § 122.—*Arnold v. Stephenson*, 17 S. W. 859.

¹ CAL.—*Stoddard v. Treadwell*, 26 Cal. 303; *Hallock v. Jaudin*, 34 Cal. 175; *Joseph v. Holt*, 37 Cal. 253; *Murdock v. Brooks*, 38 Cal. 603; *Durkee v. Cota*, 74 Cal. 313, 315, 16 Pac. 5; *Lambert v. Haskell*, 80 Cal. 613, 22 Pac. 327; *Ward v. Clay*, 82 Cal. 505, 23 Pac. 50, 227; *Whitby v. Rowell*, 82 Cal. 635, 23 Pac. 40, 382; *Savings Bank of San Diego County v. Burns*, 104 Cal. 473, 476, 38 Pac. 102; *California Imp. Co. v. Reynolds*, 123 Cal. 88, 55 Pac. 802; *Georges v. Kessler*,

instrument, other than that upon which a cause of action or a defense is founded, is attached as an exhibit, such exhibit may be referred to to supply any defect in the allegation in the complaint in relation to it; but it is not necessary that such instrument be set out.² Thus, in an action for an injunction to prevent defendants from interfering with plaintiff as the manager of a private corporation, in the exercise of his said office and position, it is not necessary to set out in *hæc verba* the articles of incorporation of the company.³ Likewise in an action on an administrator's bond, alleging a contract by the administrator, as an attorney, to prosecute an action for personal injuries to the decedent, and to accept as his compensation a stated portion of the sum recovered, and averring a failure to account, it is not necessary to set out the contract.⁴

*Declaring according to legal effect*⁵ on a contract or other written instrument is the proper and scientific

131 Cal. 185, 63 Pac. 466; Cook, Estate of, 137 Cal. 191, 69 Pac. 968; Santa Rosa Bank v. Paxton, 149 Cal. 195, 198, 86 Pac. 193; Hill v. McCoy, 1 Cal. App. 159, 81 Pac. 1015. COLO.—Abby v. Dexter, 18 Colo. App. 498, 72 Pac. 892. IDAHO—More v. Elmore County Irr. Co. 3 Idaho 729, 35 Pac. 171. KAN.—Limerick v. Barrett, 3 Kan. App. 573, 43 Pac. 853.

Contract basis of cause of action or defense, the pleading need not set out the contract or specifications in *hæc verba*.—California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802.

Deed described as "a good and sufficient deed of grant, bargain and sale" tendered to defendant, in complaint to recover possession of property sold for failure to

make stipulated payments at specified times, which worked a forfeiture under the contract, is sufficient.—Halle v. Smith, 113 Cal. 656, 45 Pac. 872.

"Made and entered into" averred of a contract, sufficiently alleges the delivery of a contract.—Limerick v. Barnett, 3 Kan. App. 573, 43 Pac. 853.

² Cook, Estate of, 137 Cal. 191, 69 Pac. 968; Santa Rosa Bank v. Paxton, 149 Cal. 195, 198, 86 Pac. 193; Harrod v. State ex rel. Maley, 24 Ind. App. 159, 55 N. E. 242; Seal v. Cameron, 24 Wash. 62, 63 Pac. 1103.

³ Seal v. Cameron, 24 Wash. 62, 63 Pac. 1103.

⁴ Harrod v. State ex rel. Maley, 24 Ind. App. 159, 55 N. E. 242.

⁵ As to pleading according to legal effect, see, ante, § 716.

method of pleading the same, either as a cause of action or as a defense;⁶ although there is authority,—under provision of local statutes,—to the effect that where a written instrument is relied upon as a cause of action or as a defense, it should be set out.⁷ But the pleading of a written instrument according to the legal effect must be direct and complete as to all the essential elements of the instrument. Thus, it will not be sufficient, in declaring upon a bond of a corporation, merely to allege that by a failure of the corporation to pay interest-coupons for more than six months after they were presented for payment, the principal of the bond has become due and payable, because that is merely pleading a conclusion of law,⁸ and not of a substantial fact; the condition of the bond showing that on such failure to pay interest-coupons the principal becomes due and payable, should be set out.⁹

Setting out in hæc verba an instrument relied upon as a cause of action or as a defense, shows conclusively an intention to make such instrument a substantial part of the pleading,¹⁰ and is a sufficient pleading of the covenants

⁶ *Fitzgerald v. Lorenz*, 79 Ill. App. 651; affirmed, 181 Ill. 411, 54 N. E. 1029; *Anderson v. Gaines*, 156 Mo. 664, 57 S. W. 726.

Bad pleading to set out written instrument in hæc verba. It should be pleaded by its legal effect.—*Anderson v. Gaines*, 156 Mo. 664, 57 S. W. 726.

Declared upon according to legal effect is sufficient, and when so declared upon there is no variance on that account.—*Dodd v. Mitchell*, 77 Ind. 388.

⁷ *Compton v. Davidson*, 31 Ind. 72; *Plowman v. Shidler*, 36 Ind. 484; *Campbell v. Cross*, 39 Ind. 155; *Brooks v. Harris*, 41 Ind. 390; *Cosgrove v. Casby*, 86 Ind. 511.

⁸ As to pleading matters of conclusion, see, ante, §§ 714, 715.

⁹ *Daine v. Cociti Reduction & Imp. Co.*, 13 N. M. 10, 79 Pac. 296.

¹⁰ *Minneapolis, St. P. & S. S. M. R. Co. v. Grethen*, 86 Minn. 323, 90 N. W. 573.

Note and mortgage not written instrument for payment of money only, under statute providing that instruments for payment of money only may be pleaded by setting out a copy, and declaring that there is a specified amount due.—*Andrews v. Wynn*, 4 S. D. 40, 54 N. W. 1047. See *First Nat. Bank of Engelbrecht*, 57 Neb. 270, 77 N. W. 685, 58 Neb. 639, 79 N. W. 55.

and promises of the obligors;¹¹ it is not necessary to further declare on it according to the legal effect.¹² But a contract or other written instrument declared on in *hæc verba* must distinctly show on its face, and not merely by implication, all the facts which the pleader would be required to allege had he set out the instrument by legal effect merely,¹³ otherwise the pleading will be insufficient;¹⁴ the recitals in a contract or other written instrument incorporated in a pleading will not supply the want of essential averments in such pleading.¹⁵ An instrument in legal effect a mortgage, and not a deed of trust, set out in *hæc verba* in a complaint, and therein declared to be "a deed of trust so being and operating as a mortgage," there is no ambiguity in the complaint, because it is the provisions and legal effect of the instrument set out, and not the name given to it by the pleader, that controls.¹⁶ While it may be sufficient to set out in *hæc verba* a written instrument upon which a cause of action or a defense is founded, this rule does not hold good as to collateral and preliminary matters of substance, which must be directly alleged; recitals in the instrument set forth can not take the place of these necessary allegations as to matters of substance.¹⁷

An exhibit attached to a pleading, and referred to therein, becomes a part of the pleading, even though not made so in express terms by the pleading.¹⁸ Where a copy of a written instrument is filed as an exhibit, being referred to and incorporated in the first paragraph of a

¹¹ *Hazelet v. Holt County*, 51 Neb. 716, 71 N. W. 717.

¹² *Miller v. Wayne International Building & L. Assoc.*, 32 Ind. App. 480, 70 N. E. 180.

¹³ *Durkee v. Cota*, 74 Cal. 313, 315, 16 Pac. 5; *More v. Elmore County Irr. Co.*, 3 Idaho 729, 35 Pac. 171.

¹⁴ *Joseph v. Holt*, 37 Cal. 250.

¹⁵ *Kelser v. Lovering*, 20 Cal. App. 41, 154 Pac. 281.

¹⁶ *Bank of Oroville v. Lawrence*, 4 Cal. Unrep. 845, 37 Pac. 936.

¹⁷ *Lambert v. Haskell*, 30 Cal. 611, 22 Pac. 327.

¹⁸ *Savings Bank of San Diego County v. Burns*, 104 Cal. 473, 38 Pac. 102.

pleading, it may be incorporated by reference merely to such exhibit in one or more of the succeeding paragraphs.¹⁹

§ 722. ——— FOREIGN DOCUMENT OR LANGUAGE. In those cases in which the written document upon which a cause of action or a defense is founded is a foreign document or an instrument in a foreign language, and the pleader is not content with a statement of such document or instrument according to the legal effect¹ thereof, he should allege that it is in a specified foreign language, a correct translation of which is as follows, setting the same out according to the English meaning;² it is not necessary to also set out the document or instrument in the language in which it was written or printed;³ and where set out in the original language without a translation, the pleading will not be sufficient,⁴ under a statutory pro-

¹⁹ *State v. Brown*, 80 Ind. 425; *Watt v. Pittman*, 125 Ind. 168, 25 N. E. 191.

¹ As to pleading instruments according to legal effect, see, ante, §§ 716, 721.

² *People v. Ah Woo*, 28 Cal. 205; *People v. Rizotto*, 30 Cal. App. 616, 618, 159 Pac. 199; *Genes v. Simon*, 21 La. Ann. 653; *State v. Willers*, 27 La. Ann. 246; *Butts v. Long*, 94 Mo. App. 687, 68 S. W. 754; *Meigs v. Guiraud*, 3 Ohio Dec. 328.

Words meaning same in English and the foreign language, the instrument must still be translated. — *State v. Marlher*, 46 Mo. App. 233; *Stichtd v. State*, 25 Tex. App. 420, 8 Am. St. Rep. 444, 8 S. W. 477.

See *Kerr's Wharton on Criminal Procedure*, 10th ed., vol. 2, § 923.

³ *People v. Rizotto*, 30 Cal. App. 616, 618, 159 Pac. 199; *Christenson v. Gorsch*, 5 Iowa 374.

As to setting out instrument in original language, see *Kerr's Wharton on Criminal Procedure*, 10th ed., vol. 2, § 923.

Pleadings should be in English language, and in pleading upon an instrument in a foreign language it is not necessary to set out a copy in the foreign language. — *Christenson v. Gorsch*, 5 Iowa 374.

See, post, § 742.

⁴ See *Kerr's Cyc. Cal. Code Civ. Proc.*, § 426, subd. 2; *People v. Ah Sum*, 92 Cal. 648, 22 Cal. 680; *People v. Rizotto*, 30 Cal. App. 616, 618, 159 Pac. 199; *State v. Marlher*, 46 Mo. App. 233; *Stichtd v. State*, 25 Tex. App. 420, 8 Am. St. Rep. 440, 8 S. W. 477.

"Ordinary language" of California, or any other of the American states, does not include a foreign language. — *Stevens v. Kabayshi*, 20 Cal. App. 153, 154, 128 Pac. 419.

vision requiring pleading to be in "ordinary and concise language,"⁵ and a constitutional provision requiring judicial proceedings to be conducted in the English language.⁶

§ 723. — PLEADING ACCOUNT. Under the California procedural code, in pleading on an account, it is not necessary for a party to set forth in such pleading the items of an account therein alleged,¹ but he must deliver to the adverse party, within five days after a demand thereof in writing,² a copy of the account,³ or be precluded from giving evidence thereof.⁴ The court, or a

⁵ Kerr's Cyc. Cal. Code Civ. Proc., § 426, subd. 2.

⁶ California Constitution, art. IV, § 24; Henning's Gen. Laws Calif., 2d ed., p. 54.

¹ Kerr's Cyc. Cal. Code Civ. Proc., § 454. See *Abadie v. Carrillo*, 32 Cal. 172, 174; *Thompkins v. Mahoney*, 32 Cal. 231; *Wise v. Hogan*, 77 Cal. 184, 186, 19 Pac. 278; *Knight v. Russ*, 77 Cal. 410, 413, 19 Pac. 698; *Murdock v. Clarke*, 90 Cal. 427, 435, 27 Pac. 275; *Burns v. Cushing*, 96 Cal. 669, 671, 31 Pac. 1124; *Rogers v. Duff*, 97 Cal. 66, 68, 31 Pac. 836; *Farwell v. Murray*, 104 Cal. 464, 468, 38 Pac. 199; *Pleasant v. Samuels*, 114 Cal. 34, 38, 45 Pac. 998; *McFarland v. Holcomb*, 123 Cal. 84, 87, 55 Pac. 761; *Downing v. Mulcahy*, 6 Cal. Unrep. 242, 56 Pac. 466; *Pike v. Zadig*, 171 Cal. 273, 152 Pac. 923; *Jewell v. Colonial Theater Co.*, 12 Cal. App. 681, 108 Pac. 527; *Aydelotte v. Bloom*, 13 Cal. App. 56, 58, 108 Pac. 877.

² Kerr's Cyc. Cal. Code Civ. Proc., § 454; *Graham v. Harmon*, 84 Cal. 181, 185, 25 Pac. 1097.

Motion for bill of particulars ipso facto extends time for

answering.—*Plummer v. Well*, 15 Wash. 427, 46 Pac. 648.

³ Kerr's Cyc. Cal. Code Civ. Proc., § 454.

Bill of particulars itself, and not copy thereof, must be delivered on the request for a bill.—*Edelman v. McDonnell*, 126 Cal. 210, 213, 58 Pac. 528.

Filing bill of particulars is not required; it must be delivered to the adverse party.—*Edelman v. McDonald*, 126 Cal. 210, 213, 58 Pac. 528.

No written pleadings, on appeal from justices' court, bill of particulars is properly required.—*De Lappe v. Sullivan*, 7 Colo. 182, 2 Pac. 926.

Requisites of sufficient bill a setting forth with as much particularity as the nature of the case will permit of.—*Conner v. Hutchinson*, 17 Cal. 272, 289.

—"For merchandise as per bill" was held to be sufficient bill of particulars in *Providence Tool Co. v. Prader*, 32 Cal. 634, 638, 91 Am. Dec. 598.

⁴ Kerr's Cyc. Cal. Code Civ. Proc., § 454; *McCarty v. Mt. Te-carte Land & Water Co.*, 110 Cal.

judge thereof, may order a further account when the one delivered is too general, or is defective in any particular;⁵ but a right to a further bill of particulars, or to object to the evidence within the general scope of the complaint and bill of particulars, must be taken advantage of promptly;⁶ a delay of five months after the service of the bill of particulars and until trial, will be too late.⁷

Account includes almost every claim on contract,⁸ and for that reason it has been held to include material made necessary by reason of imperfect material furnished by a contractor, or imperfect construction, under a building contract;⁹ but it does not include an account stated.¹⁰

687, 692, 43 Pac. 391; *Silva v. Blair*, 141 Cal. 599, 601, 75 Pac. 162; *Robbins v. Butler*, 15 Colo. 496, 32 Pac. 803; *Scott v. Frost*, 4 Colo. App. 557, 36 Pac. 910.

One count not open to demand for bill of particulars, on failure to furnish bill, error to exclude evidence on that count.—See *More v. Bates*, 46 Cal. 29, 30.

⁵ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 454.

Bill too general it can not be ignored on that account; a further account must be requested.—*Providence Tool Co. v. Prader*, 32 Cal. 634, 638, 91 Am. Dec. 598; *Hart v. Spect*, 67 Cal. 187, 190. See *Conner v. Hutchinson*, 17 Cal. 279, 281.

Discretion of court in ordering a bill of particulars.—*Ferry v. King County*, 2 Wash. St. 337, 26 Pac. 537.

Order for further account must state particulars in which required.—*Conner v. Hutchinson*, 17 Cal. 279, 281.

⁶ Itemized statement of plaintiff's claim on an assignment of a portion of claims secured by mechanics' lien, covering the claims

that had been assigned only, by failure to except to the bill of particulars and ask for a further bill of particulars the defendant waives his right to object on the trial.—*Union Lumber Co. v. Morgan*, 162 Cal. 722, 124 Pac. 228.

Verification defective timely objection must be made thereto; it will be too late to delay until the trial of the case.—*Dennison v. Smith*, 7 Cal. 437, 438.

⁷ *Ames v. Bell*, 5 Cal. App. 1, 6, 89 Pac. 619.

⁸ Aggregate of a number of items, or separate demands, whether for labor or material, or of both, or of goods or other articles.—See *Jensen v. Dorr*, 159 Cal. 748, 116 Pac. 553.

Value of use and occupation sued for does not present a claim on which a bill of particulars can be required.—*More v. Bates*, 46 Cal. 29, 30.

⁹ *Long Beach City School Dist. v. Dodge*, 135 Cal. 401, 407, 67 Pac. 499. See *Jensen v. Dorr*, 159 Cal. 748, 116 Pac. 553.

¹⁰ *Auzerlas v. Naglee*, 74 Cal. 60, 64, 15 Pac. 371.

Bill of particulars, furnished in response to a statutory demand, is but an amplification of the complaint,¹¹ designed to apprise a party of the specific demands of his adversary;¹² but it does not set forth a cause of action or the ground of a defense,¹³ and is not vulnerable to a special demurrer.¹⁴ An amended bill of particulars supersedes all others,¹⁵ and, when ordered by the court, is to be construed as an amended pleading.¹⁶

Common counts have been already discussed and shown not to have a place under procedural codes by any legitimate interpretation, but that they have been recognized as sufficient in several states, including California.¹⁷

¹¹ *Edelman v. McDonnell*, 126 Cal. 210, 213, 58 Pac. 528; *Chapman v. Bent*, 6 Cal. Unrep. 740, 65 Pac. 959; *Blackburn v. Washington Gold Min. Co.*, 19 Wash. 361, 53 Pac. 369.

¹² Object of bill of particulars is to apprise opposite party of nature and extent of cause of action or defense, that he may plead with greater certainty and prepare to meet the issues; if the party demanding a bill of particulars has means of obtaining such information there is no reason for ordering a bill of particulars to be furnished.—*Ferry v. King County*, 2 Wash. St. 337, 26 Pac. 537.

—Discovery of facts necessary to enable party to plead can not be obtained by a bill of particulars.—*Ingram v. Wishkah Boom Co.*, 35 Wash. 191, 77 Pac. 34.

—Evidence upon which party relies can not be required to be disclosed in a bill of particulars.—*Blackburn v. Washington Gold Min. Co.*, 19 Wash. 361, 53 Pac. 369.

Use of in connection with evidence of party furnishing the bill

is permissible on ground of convenience of witness testifying, where the proper foundation is laid therefor.—*Montgomery & Mullen Lumber Co. v. Ocean Park Scenic R. Co.*, 32 Cal. App. 32, 161 Pac. 1171.

¹³ *Pike v. Zadig*, 171 Cal. 273, 276, 152 Pac. 923.

¹⁴ *Id.*

¹⁵ *Ames v. Bell*, 5 Cal. App. 1, 6, 89 Pac. 619.

¹⁶ *Ames v. Bell*, 5 Cal. App. 1, 4, 89 Pac. 619.

¹⁷ See, ante, § 26.

"If the question were new, there might be good ground for saying that the common counts do not comply with the provisions of our Code of Civil Procedure, § 426, requiring that the complaint must contain 'a statement of the facts constituting the cause of action, in ordinary and concise language'; but the practice of pleading in this form has been too long established in this state to be now open to question." — Mr. Justice Sloss in *Pike v. Zadig*, 171 Cal. 273, 276, 152 Pac. 923.

§ 724. — PLEADING JUDGMENT. By provision of the California procedural code,—and the other procedural codes have a like provision,—in pleading a judgment or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction.¹ The only advantage conferred upon a pleader by such a statute is that of relieving him from the necessity of pleading the facts conferring jurisdiction upon the court, officer, or board;² and a pleading so drawn imports a lawful act or judgment within the power and authority of the court, officer, or board.³ Strict compliance with the provisions of the statute is required.⁴ “Duly rendered,” not being equivalent to the statutory “duly given or made,” has been held to be insufficient;⁵ and “adjudged” is not equivalent to “judgment.”⁶ It is not necessary to allege that a judgment is in full force and effect and not vacated, set aside,

¹ Kerr's Cyc. Cal. Code Civ. Proc., § 456.

Denial of due organization of an irrigation district, petitioners must establish due organization by competent evidence.—Madera Irr. Dist., In matter of, 92 Cal. 296, 334, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272.

Inferior board's decision on jurisdiction not conclusive on collateral attack, or even prima facie in direct proceedings.—Madera Irr. Dist., In matter of, 92 Cal. 96, 334, 27 Am. St. Rep. 106, 17 L. R. A. 755, 28 Pac. 272.

² Weller v. Dickinson, 93 Cal.

108, 110, 28 Pac. 854; Buckman v. Hatch, 139 Cal. 53, 57, 72 Pac. 445.

³ Hibernia Sav. & L. Soc. v. Boyd, 155 Cal. 193, 197, 100 Pac. 239; Williams v. Lane, 158 Cal. 39, 109 Pac. 873.

⁴ Young v. Wright, 52 Cal. 407, 410; Judah v. Fredericks, 57 Cal. 389, 391; Los Angeles, City of, v. Mellus, 59 Cal. 444, 451.

⁵ Young v. Wright, 52 Cal. 407, 410; Harmon v. Comstock Horse & Cattle Co., 9 Mont. 243, 23 Pac. 470.

⁶ Edwards v. Hellings, 99 Cal. 214, 33 Pac. 799. See Mears v. Shaw, 32 Mont. 575, 81 Pac. 338.

reversed or appealed from;⁷ or that an execution has been issued,⁸ or other effort made to collect the judgment.

Board of supervisors of the county is a body within the provisions of the statute, and it is sufficient to allege generally that a resolution of intention to make a specified improvement, or other act or determination within the jurisdiction and power of such board, was "duly passed," or "duly made";⁹ but where the resolution shows on its face that it is void, and is copied into the complaint, the allegation that it was "duly made" does not show a valid resolution to improve, and all subsequent acts of the board will be null and void; an allegation that such subsequent acts, proceedings and orders of the board were "duly made," or "duly given," will not have the effect to remedy the original jurisdictional defect.¹⁰

City council is a body included within the statute, and it is sufficient in pleading an ordinance, or other act, resolution, and the like, of that body, to allege generally that it was "duly passed and adopted,"¹¹ or was "duly made," and the like; or that an act or determination required by that body to be done was "duly done,"¹² or "duly made," in determining to have public improvement done.¹³

⁷ See *Choquette v. Ortet*, 60 Cal. 594, 601; *Carter v. Paige*, 80 Cal. 390, 32 Pac. 188; *Bronzan v. Drobas*, 93 Cal. 647, 29 Pac. 254.

⁸ *King v. Blood*, 41 Cal. 314, 317.

⁹ *Babcock v. Goodrich*, 47 Cal. 488, 512; *Buckman v. Hatch*, 139 Cal. 53, 57, 72 Pac. 445; *Gurnsey v. Northern Cal. Power Co.*, 7 Cal. App. 534, 543, 94 Pac. 858.

Declaration irrigation district duly organized, by the board of supervisors is not within the provisions of the statute, and can not be so pleaded.—*Decker v. Perry*, 4 Cal. Unrep. 488, 35 Pac. 1017.

Resolution setting aside assessment for street improvement and directing a new assessment, is within the statute.—*Williams v. Bergin*, 127 Cal. 578, 580, 60 Pac. 164.

¹⁰ *Buckman v. Hatch*, 139 Cal. 53, 57, 72 Pac. 445.

¹¹ *Los Angeles, City of, v. Waldron*, 65 Cal. 283, 3 Pac. 890; *Crouse v. Barrows*, 156 Cal. 154, 156, 103 Pac. 894.

¹² *Bituminous Lime Rock Paving & Imp. Co.*, 4 Cal. Unrep. 151, 33 Pac. 1117.

¹³ *Pacific Paving Co. v. Bolton*, 97 Cal. 8, 31 Pac. 625.

Justices' court included within the statute, but an allegation "that such proceedings were had thereafter, as provided by law, that on" a designated date "judgment was rendered by said justices' court," can not be said to be a compliance with the requirement of the statute requiring the allegation to be that the judgment was "duly given or made";¹⁴ but there is not a total absence of averment, and the pleading can not be taken advantage of by objection made for the first time in the appellate court.¹⁵

—— ——— *In Montana*, and perhaps elsewhere, the judgment in a justices' court can not be thus pleaded; the jurisdiction of the justice must be fully pleaded;¹⁶ and such seems to have formerly been the rule in California.¹⁷

Probate court within the provision of the statute, and sufficient to allege that the judgment was "duly given or made";¹⁸ that a will was "duly probated";¹⁹ that an administrator, or other probate officer, was "duly appointed";²⁰ or that letters of administration were "duly granted" to the plaintiff who "duly qualified";²¹ but it is not sufficient to allege that by order and decree of the probate court the party was duly appointed, because such allegation does not state the appointment was by the probate court.²²

¹⁴ *Kriste v. International Sav. & Exch. Bank*, 17 Cal. App. 301, 306, 119 Pac. 666.

¹⁵ *Id.* See *White v. San Rafael & S. Q. R. Co.*, 50 Cal. 417; *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 599, 14 Pac. 379; *Ortega v. Cordero*, 88 Cal. 221, 26 Pac. 80; *Sauer v. Eagle Brewing Co.*, 3 Cal. App. 127, 84 Pac. 425.

¹⁶ *Weaver v. English*, 11 Mont. 84, 27 Pac. 396.

¹⁷ See *Swain v. Chase*, 12 Cal. 283, 286; *Rawley v. Howard*, 23 Cal. 401, 404; *Jolley v. Faltz*, 34 Cal. 321, 326.

¹⁸ *Beans v. Emanuelli*, 36 Cal. 117, 120; *Wise v. Hogan*, 77 Cal. 184, 189, 19 Pac. 278; *Hibernia Sav. & L. Soc. v. Boyd*, 155 Cal. 193, 197, 100 Pac. 239.

¹⁹ *Riddell v. Harrell*, 71 Cal. 254, 259, 12 Pac. 67.

²⁰ *Kirsch v. Derby*, 96 Cal. 602, 604, 31 Pac. 567; *Collins v. O'Laverty*, 136 Cal. 31, 68 Pac. 327; *San Francisco & F. L. Co. v. Hartung*, 138 Cal. 223, 230, 71 Pac. 937.

²¹ *McCutcheon v. Weston*, 65 Cal. 37, 39, 2 Pac. 727.

²² *Kreling v. Kreling*, 118 Cal. 413, 420, 50 Pac. 546.

Superior and supreme court are of course within the statute, and a general allegation that a judgment of the former court was "duly given and made" is all that is required;²³ and generally to allege that a judgment has been affirmed or reversed is all that is required in respect to the latter court.²⁴

Not within the statute is an appeal from a justices' court to the superior court, such appeal being neither a judgment nor other determination within the statute;²⁵ or an order of a board of supervisors to the district attorney to condemn lands for a private way, such order not being a "determination" within the statute;²⁶ or the declaration of a board of supervisors that an irrigation district is duly organized.²⁷

§ 725. — PLEADING CONDITIONS PRECEDENT. The conditions precedent to the commencement of an action, and the sufficiency of the allegations as to a compliance with or performance of such conditions, has already been sufficiently discussed;¹ it remains but to add here that, in California, in pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts

²³ *Murdock v. Brooks*, 38 Cal. 596, 601; *McCutcheon v. Weston*, 65 Cal. 37, 39, 2 Pac. 727; *Pomeroy v. Gregory*, 66 Cal. 572, 6 Pac. 492; *Campe v. Lassen*, 67 Cal. 139, 7 Pac. 430; *Weller v. Dickinson*, 93 Cal. 108, 110, 28 Pac. 854; *High v. Bank of Commerce*, 95 Cal. 386, 389, 29 Am. St. Rep. 121, 30 Pac. 556; *Freeman v. Spencer*, 128 Cal. 394, 397, 60 Pac. 979; *Title Insurance & Trust Co. v. Grider*, 152 Cal. 748, 94 Pac. 601; *Williams v.*

Lane, 158 Cal. 39, 109 Pac. 873; *Fisher v. Kelly*, 30 Ore. 1, 46 Pac. 146.

²⁴ *Ashton v. Heydenfeldt*, 124 Cal. 14, 18, 56 Pac. 624.

²⁵ *Moffatt v. Greenwalt*, 90 Cal. 368, 27 Pac. 296.

²⁶ *Sonoma County v. Crozier*, 118 Cal. 680, 682, 50 Pac. 845.

²⁷ *Williams v. Bergin*, 127 Cal. 578, 580, 60 Pac. 164.

¹ As to conditions precedent to actions, see, ante, §§ 487-495.

showing such performance.² A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed.³ Thus, in an action upon a contract for the sale of land upon a condition, the happening of that condition must be alleged with certainty and without ambiguity;⁴ but in an action upon an assessment for street improvement, it is not necessary to allege the issuance of the engineer's certificate, and so forth, it being alleged that the contract was duly performed, because the performance is the ultimate fact in the case, and the engineer's certificate, and so forth, are but evidence of that ultimate fact.⁵

Construction of conditions precedent is to be strict,⁶ with reference to the parties at the time of the contract,⁷ the situation of the parties at the time of contracting,⁸ and with reference to the subject-matter at the time of contracting.⁹ Stipulations embodied in a contract will not be construed as conditions precedent, unless such a construction is made necessary by the express terms of the contract.¹⁰

² Kerr's Cyc. Cal. Code Civ. Proc., § 457; *Davis v. Connecticut Fire Ins. Co.* (dis. op.), 158 Cal. 766, 112 Pac. 549.

³ Kerr's Cyc. Cal. Civ. Code, § 1436.

As to conditions precedent, generally, Kerr's Cyc. Cal. Civ. Code annotations to § 1436.

⁴ *People v. Central Pac. R. Co.*, 76 Cal. 29, 40, 41, 18 Pac. 90.

⁵ *City Street Imp. Co. v. Marysville, City of*, 155 Cal. 419, 432, 101 Pac. 308.

⁶ *Front Street, M. & O. R. Co. v. Butler*, 50 Cal. 574, 577; *Cullen v. Sprigg*, 83 Cal. 56, 64, 23 Pac. 222; *Deacon v. Blodget*, 111 Cal. 416, 418, 44 Pac. 159; *Antonelle v. Kennedy & Shaw Lumber Co.*, 140 Cal.

309, 315, 73 Pac. 966; *Tilley v. King*, 109 N. C. 461, 13 S. E. 936.

⁷ CAL.—*Stockton, City of, v. Weber*, 98 Cal. 433, 439, 33 Pac. 322. ILL.—*Eldridge v. Rowe*, 7 Ill. (2 Gilm.) 91, 34 Am. Dec. 41. MD.—*Stickney's Will, In re*, 85 Md. 79, 60 Am. St. Rep. 308, sub nom. *Congregational Church Building Soc. v. Everitt*, 35 L. R. A. 693, 36 Atl. 654. VA.—*Burdiss v. Burdiss*, 96 Va. 81, 70 Am. St. Rep. 825, 30 S. E. 462. FED.—*Finlay v. King*, 28 U. S. (3 Pet.) 346, 7 L. Ed. 710.

⁸ *Stockton, City of, v. Weber*, 98 Cal. 433, 439, 33 Pac. 332.

⁹ Id.

¹⁰ *Front Street, M. & O. R. Co. v. Butler*, 50 Cal. 574, 577; *Witmer Bros. Co. v. Weld*, 108 Cal. 569,

Contract conditions-precedent embodied in the terms of the contract sued on, only, are included within the provisions of the statute above set out; conditions precedent prescribed by statute must be fully pleaded in the regular way, by setting out the facts showing performance, and not by simply stating the ultimate fact of performance, as provided for in the above statute.¹¹

§ 726. — PLEADING STATUTE OF LIMITATIONS. In pleading the statute of limitations, under the California procedural code,¹ it is not necessary to state the facts showing the defense, but it may be stated generally that the action is barred by a section (giving the number of the section) of the Code of Civil Procedure,² also giving the subdivision of the section relied upon,³ if the section

579, 41 Pac. 491; *Deacon v. Blodget*, 111 Cal. 416, 418, 44 Pac. 159; *Antonelle v. Kennedy & Shaw Lumber Co.*, 140 Cal. 309, 319, 73 Pac. 966.

¹¹ *Dye v. Dye*, 11 Cal. 163; *Blanchard v. Beideman*, 18 Cal. 261; *Russell v. Mann*, 22 Cal. 131, 133; *People ex rel. Hastings v. Jackson*, 24 Cal. 630, 632; *People v. Holli-day*, 25 Cal. 300, 303; *Himmelman v. Danos*, 35 Cal. 441, 448; *Rhoda v. Alameda County*, 52 Cal. 350, 352.

¹ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 458.

² *Biddel v. Brizzolara*, 56 Cal. 374, 381; *Packard v. Johnson*, 2 Cal. Unrep. 365, 4 Pac. 632; *Hagley v. Hagley*, 68 Cal. 348, 352, 9 Pac. 305; *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598, 600, 14 Pac. 379; *Webber v. Clarke*, 74 Cal. 11, 17, 15 Pac. 431; *Allen v. Allen*, 95 Cal. 184, 194, 16 L. R. A. 646, 27 Pac. 30, 30 Pac. 213; *Nicholson v. Tarpey*, 124 Cal. 442, 449, 57 Pac. 457; *Spanish Fork, City*

v. Hopper, 7 Utah 235, 238, 26 Pac. 293; *Whittaker v. Greenwood*, 17 Utah 33, 37, 53 Pac. 756; *Fullerton v. Bailey*, 17 Utah 85, 92, 53 Pac. 1020; *Snow v. Rich*, 22 Utah 123, 132, 61 Pac. 336.

"And these defendants aver and say that the said pretended causes of action of the plaintiffs are each and all thereof barred by § 337, ch. III, tit. II, pt. II, of the Code of Civil Procedure of California, and also by § 343 of the same chapter and title and part of said Code of Civil Procedure, and also by § 319 of ch. II, of said title and code"; held to be sufficient to comply with the requirements of the above statute in *Nicholson v. Tarpey*, 124 Cal. 442, 449, 57 Pac. 457.

—Reference to chapter, title and part only, insufficient. See footnote 6, this section.

³ *Wolters v. Thomas*, 3 Cal. Unrep. 843, 32 Pac. 565.

Number of subdivision must be given; it is not sufficient simply to give the number of the sec-

is stated in subdivisions.⁴ If the allegation be controverted, the party pleading the statute must establish on the trial the facts showing that the cause of action is so barred.⁵ This statute was inserted to simplify the pleading of the statute of limitations, where the recitation of that statute is relied upon as a defense, and the statute must be strictly complied with.⁶ No departure from the letter of the statute is to be indulged in a conjecture as to what the legislature intended to expect from the operation of the statute in certain cases.⁷ Pleading the defense in the language of the statute, designating the section,⁸ and the subdivision of the section, where it is subdivided,⁹ relied upon, is sufficient.¹⁰ It is not necessary to anticipate and recite in such a plea any defense as to time which might be set up in avoidance of the statute.¹¹ A general allegation that the cause of action is barred by a statute prescribing a designated time within which action of the class to which the pending action belongs must be commenced, is not a sufficient allegation of a defense of the

con.—*Walters v. Thomas*, 3 Cal. Unrep. 842, 32 Pac. 565.

—Objection that subdivision of section is not referred to need not be taken by demurrer, on the ground of uncertainty or ambiguity: the objection not being that there is uncertainty in the statement of facts, but that the facts are not stated.—*Walters v. Thomas*, 3 Cal. Unrep. 843, 846, 32 Pac. 565.

⁴ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 454.

⁵ *Id.*

⁶ *Young v. Wright*, 52 Cal. 407; *Judah v. Fredericka*, 57 Cal. 389; *Manning v. Dallas*, 73 Cal. 429, 15 Pac. 34; *Allen v. Allen*, 95 Cal. 194, 194, 16 L. R. A. 646, 27 Pac. 30, 30 Pac. 213; *Walters v. Thomas*, 3 Cal. Unrep. 842, 846, 32 Pac. 565.

See, also, authorities in footnotes 1 and 2, this section.

Pleading by reference to chapter, title and part of the Code of Civil Procedure, is insufficient.—*Manning v. Dallas*, 73 Cal. 429, 431, 15 Pac. 34.

See, also, footnote 2, this section.

⁷ *Allen v. Allen*, 95 Cal. 194, 194, 16 L. R. A. 646, 27 Pac. 30, 30 Pac. 213.

⁸ See authorities, ante, footnote 2, this section.

⁹ See authorities, ante, footnote 2, this section.

¹⁰ *Richardson v. Williamson*, 24 Cal. 289, 286; *Vassault v. Seitz*, 31 Cal. 225, 230; *Anderson v. Fisk*, 35 Cal. 625, 632.

¹¹ *Id.*

statute of limitations, under the above code provision as to the method of pleading the bar of the statute.¹²

Particular class of cases, only, covered by a statute of limitations, a party seeking to rely upon the protection of such statute as a defense, must specially plead the section¹³ and subdivision of the section, where there are subdivisions thereof,¹⁴ as an affirmative defense in his answer; otherwise he will be deemed to have waived the protection of the statute; a general plea of the statute will not suffice.¹⁵

Demurrer raising the statute of limitations, is sufficient in form where it specifies the statute as one of the grounds of the demurrer, without setting out the section and subdivision, where there are subdivisions, relied upon;¹⁶ but a demurrer upon this ground can be sustained only when it appears from the face of the complaint that the cause of action or defense is barred; the party can not, in support of the demurrer, invoke other facts which might be introduced in his defense, but which are proper in an answer only.¹⁷

§ 727. — PLEADING PRIVATE STATUTE, MUNICIPAL ORDINANCES, ETC. In pleading a private statute, or an or-

¹² *Schroeder v. Johns*, 27 Cal. 274, 279; *Stewart v. Budd*, 7 Mont. 573, 19 Pac. 221; *Spanish Fork City v. Hopper*, 7 Utah 235, 26 Pac. 293.

¹³ See authorities, footnote 2, this section.

¹⁴ See authorities, footnote 3, this section.

¹⁵ *Howell v. Rogers*, 47 Cal. 291, 293.

¹⁶ *Brennan v. Ford*, 46 Cal. 7; *Williams v. Bergin*, 116 Cal. 56, 59, 47 Pac. 877; *Spreckels v. Spreckels*, 172 Cal. 775, 783, 158 Pac. 537.

Provisions of statute set out in this section has reference to causes in which the statute of limitations is pleaded in the answer as an affirmative defense; the language of the statute clearly indicates that the section has no reference to a demurrer to a complaint upon the ground that the facts alleged therein show that the cause of action is barred; in such a case it is sufficient to specify the statute as one of the grounds of the demurrer. — *Williams v. Bergin*, 116 Cal. 56, 59, 47 Pac. 877.

¹⁷ *Williams v. Bergin*, 116 Cal. 56, 59, 47 Pac. 877.

dinance¹ of a county or municipal corporation, or a right derived therefrom, under the California procedural code, it is sufficient to refer to such statute or ordinance by its title and the day of its passage.² In pleading the performance of conditions precedent³ under a statute or ordinance of a county or municipal corporation, or of a right derived therefrom, it is not necessary to state the facts showing the performance, but it may be stated generally that the party duly performed all the conditions on his part required thereby;⁴ if such allegations be controverted the party pleading must establish, on the trial, the facts showing such performance.⁵ A party seeking to take advantage of this statute must frame his pleading strictly in accordance with the provisions thereof, simply alleging "that certain ordinance of said," giving the name of the city, "known as ordinance No. 60," is insufficient under the statute because of a failure to set out either the title or the date of its passage;⁶ but it has been said that although an ordinance is not pleaded as required by this section of the code, and not set out in *hæc verba*, its existence must be assumed as against a general demurrer.⁷

§ 728. — PLEADING SURPLUSAGE AND UNNECESSARY MATTERS. The general rule of pleading is that no fact should be stated which is not pertinent, and the state-

¹ As to pleading ordinances, see note 35 L. R. A. 226.

² Kerr's Cyc. Cal. Code Civ. Proc., 2d ed., § 459; Consolidated Supp. 1906-1913, p. 1468.

Statute unconstitutional which provides that it shall not be necessary to plead or prove the existence or validity of any ordinance of a city of the fifth class, being a special statute in violation of the general law set out in the text of this section.—See *Tulare, City of*,

v. Henren, 126 Cal. 226, 229, 58 Pac. 530.

³ As to pleading conditions precedent, see, ante, § 725.

⁴ Kerr's Cyc. Cal. Code Civ. Proc., 2d ed., § 459; Consolidated Supp. 1906-1913, p. 1468.

⁵ *Id.*

⁶ *Tulare, City of, v. Hevren*, 126 Cal. 226, 229, 58 Pac. 530.

⁷ *Amestoy v. Electric Rapid Transit Co.*, 95 Cal. 311, 315, 30 Pac. 550.

ment of which is not necessary.¹ It is not necessary to allege more than will constitute, *prima facie*, a cause of action or defense; all beyond that is, or may be, treated as surplusage.² Such as "duly," "wrongfully," "unlawfully" used in connection with issuable facts;³ absurd allegations, the truth of which is impossible;⁴ conclusions of law;⁵ evidentiary matters or facts;⁶ unnecessary recitals;⁷ words in pleading putting false or wrong construction on written instrument set out,⁸ and the like. More extended illustrations may be given, as: Allegation in complaint by guardian that he was duly and regularly appointed by a named court, adding "and by virtue of sections 225 and 3202," the quoted words were held to be surplusage and wholly immaterial.⁹ Complaint in ejectment by an unincorporated benevolent society, the trustees of which are entitled to hold real estate and sue for its protection under the law, containing an allegation of incorporation, such allegation may be treated as surplusage.¹⁰ Complaint to recover damages for injuries to a servant, charging ordinary negligence but not wilful misconduct, using the words "reckless" and "wanton,"

¹ See Bliss on Code Pleading, § 214.

² Smith v. Holmes, 54 Mich. 104, 19 N. W. 767.

³ Not vitiate pleading, but are surplusage, and better omitted.—Miles v. McDennott, 31 Cal. 271.

See, post, § 742, footnote 52 and text going therewith.

⁴ Sacramento County Supervisors v. Bird, 31 Cal. 67.

⁵ Johnson v. American Smelting & Refining Co., 80 Neb. 255, 116 N. W. 517.

As to pleading conclusions of law, see, ante, § 715.

This does not apply to conclusions of fact.—Western Travelers' Accident Assoc., 73 Neb. 858, 1

L. R. A. (N. S.) 1068, 103 N. W. 688.

As to pleading conclusions, generally, see, ante, § 714.

⁶ Ellis v. May, 97 Mich. 568, 56 N. W. 1035.

⁷ Poirier v. Gravel, 88 Cal. 79, 82, 25 Pac. 962.

⁸ Stoddard v. Treadwell, 26 Cal. 294; Heinlen v. Martin, 2 Cal. Unrep. 20, case modified but this point not effected or discussed in 53 Cal. 321, 59 Cal. 181.

⁹ Hindroff v. Sovereign Camp of Woodmen of the World, 150 Iowa 185, 129 N. W. 831.

As to pleading condition precedent, see, ante, § 725.

¹⁰ Brown v. Webb, 60 Ore. 526, 120 Pac. 387.

these words may be disregarded or stricken out as surplusage.¹¹ Defective allegation in respect to a mistake in reducing to writing a contract, may be treated as surplusage, where both the contract and the written instrument are set out, and the court can determine the matter therefrom.¹² Interest of the parties being such that one can not sue for all, an allegation that plaintiff sues for the benefit of all will be regarded as surplusage, and the action treated as brought by plaintiff in his own behalf.¹³ Pleading assuming to answer the plea "of B, sixthly above pleaded," when in fact B pleaded but five points, the sixth plea being by A, who was joined with B in the suit, such uncertainty is *falsa demonstratio*, and the name of B may be stricken out as surplusage.¹⁴

Unnecessary allegations inserted in a pleading, otherwise good, will not vitiate it;¹⁵ such allegations, and the findings thereon, may be treated as surplusage.¹⁶ Thus, where the complaint in an action brought by a taxpayer to enjoin performance by a city of a contract not let to the lowest bidder, as the law requires, joins therewith an action to compel the city to award the contract to plaintiff, as the lowest bidder, as the latter action will not lie, all allegations relating thereto and the prayer for relief thereon may be disregarded as surplusage.¹⁷ And where the allegations in complaint in an action by a taxpayer to enjoin the enforcement of a local assessment, if true, do not entitle him to the relief asked, a denial of such facts in the answer will be treated as surplusage.¹⁸ Com-

¹¹ *Kuphal v. Western Montana Flouring Co.*, 43 Mont. 18, 114 Pac. 122.

¹² *Gardner v. California Guarantee Investment Co.*, 137 Cal. 71, 69 Pac. 844.

¹³ *Linden Land Co. v. Milwaukee Electric R. & Light Co.*, 107 Wis. 493, 83 N. W. 851.

¹⁴ *Jenness v. Black Hawk, City of*, 2 Colo. 578.

¹⁵ *Bunker v. Osborn*, 132 Cal. 480, 64 Pac. 853; *Benalkin v. Guthrie*, 111 Wis. 554, 87 N. W. 466.

¹⁶ *Bunker v. Osborn*, 132 Cal. 480, 64 Pac. 853.

¹⁷ *Times Pub. Co. v. Everett, City of*, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. 695.

¹⁸ *Chicago, M. & St. P. R. Co. v. Phillips*, 111 Iowa 377, 82 N. W. 787.

plaint setting out a cause of action which is sufficient, will be good notwithstanding the fact that by the unnecessary statement of historical matters connected with such cause of action an entirely different cause of action is also stated.¹⁹ But where a complaint for failure to account for moneys had and received from plaintiff as his agent, states a cause of action for moneys had and received, and contains, in addition, allegations of conversion of such moneys, on demurrer to the complaint, the court can not disregard, as surplusage, the allegations as to conversion, and hold the complaint good for moneys had and received.²⁰ Answer in ejectment denying plaintiff's title, and in addition setting forth the various links in plaintiff's title, and declaring them to be defective, the latter are properly stricken out as surplusage.²¹ Complaint by a passenger for damages for personal injuries through derailment of a coach in which he was traveling, also containing allegations as to the cause of the derailment, the latter allegations may be disregarded or stricken out as surplusage.²² Injuries charged as having been received through the negligence of the master to exercise proper care in furnishing complainant with a safe place to work, an allegation as to giving of the notice of injury required by the Fellow-Servants Act, may be stricken out as surplusage.²³ Complaint for wrongful ejectment from railway train, charging a breach of contract, and also charging tortious acts on the part of the

¹⁹ *South Bend Chilled Plow Co. v. Cribb Co.*, Geo. C., 97 Wis. 230, 72 N. W. 749.

²⁰ *Jones v. Winsor*, 22 S. D. 480, 118 N. W. 716.

²¹ *Nelson v. O'Brien*, 139 Cal. 628, 73 Pac. 469.

²² *Hoskins v. Northern Pac. R. Co.*, 39 Mont. 394, 102 Pac. 988; *Whale v. Great Northern R. Co.*, 41 Mont. 326, 109 Pac. 713.

Unnecessarily specific facts stated in a complaint otherwise setting forth a good cause of action for injuries, is not cause for complaint on the part of the defendant.—*Whale v. Great Northern R. Co.*, 41 Mont. 326, 109 Pac. 713.

²³ *Young v. Missouri, K. & T. R. Co.*, 82 Kan. 332, 108 Pac. 99.

conductor, the latter allegations may be stricken out as surplusage.²⁴

§ 729. — PLEADING DESCRIPTION OF REAL PROPERTY. The California procedural code provides that in an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it.¹ A description of land by giving the official survey by town, range, base meridian, section and fractional part thereof, is always sufficient. A description by metes and bounds from a sufficiently-definite and well-defined starting point, and then by courses and distances, is sufficient;² so also is a description by reference to a recorded map or plat, stating the number of the lot or tract by such map, or by giving the corner of two streets and the number of feet on each street.³ Description by name, where the property has a well-known name,⁴ or by the name of an adjoining owner and natural land-marks,⁵ may be sufficient. An omission

²⁴ Chase v. Atchison, T. & S. F. R. Co., 70 Kan. 546, 79 Pac. 153.

¹ Kerr's Cyc. Cal. Code Civ. Proc., § 455.

Any one familiar with the property enabled to identify it from the description, and almost the description by which the property was conveyed to the defendant, the description will be sufficient.— Bay State Mining & Townsite Co. v. Jackson, 27 Colo. 139, 60 Pac. 573.

Sufficiency of description on face of complaint, question for court and jury.—Moss v. Shear, 30 Cal. 467-469.

² Carpentier v. Grant, 21 Cal. 140, 141; Sherman v. McCarthy, 57 Cal. 507, 510; Muir v. Meredith, 82 Cal. 19, 22 Pac. 1080.

³ Doll v. Feller, 16 Cal. 432, 433.

⁴ Hernandez v. Simon, 4 Cal. 182, 183; Castro v. Gill, 5 Cal. 40, 42; Whitney v. Buckman, 19 Cal. 300, 301; People v. Leet, 23 Cal. 161, 162, 163; More v. Del Valle, 28 Cal. 170, 173; Hildreth v. White, 66 Cal. 549, 6 Pac. 454; Phelan v. Poyoreno, 74 Cal. 448, 455, 13 Pac. 681, 16 Pac. 241.

Description by name as good as description by metes and bounds, if it can be rendered sufficiently certain by evidence.—Castro v. Gill, 5 Cal. 40, 42.

⁵ Hernandez v. Simon, 4 Cal. 182, 183; Lawrence v. Davidson, 44 Cal. 177, 180; Hihn v. Mangenberg, 89 Cal. 268, 270, 26 Pac. 968.

Missions named as boundaries, containing six square leagues, held to be a sufficient description, the name of the ranch being given.— More v. Del Valle, 28 Cal. 170, 173.

in a description of the county,⁶ or the state,⁷ is not necessarily fatal to the sufficiency of the description, because a reference to the caption of the pleading will furnish the county and state;⁸ but where the description is so indefinite and uncertain that an officer could not identify the land without a resort to other sources of information, it will be insufficient to support a judgment.⁹

§ 730. ADOPTING ALLEGATIONS BY REFERENCE. A custom has grown up among attorneys, sanctioned by the courts, of referring to a fact or facts which appear in a former part of the pleading, and making them part of a subsequent allegation by reference and adoption and incorporation, which form of pleading is held to be substantially good without specially reciting the facts referred to.¹ Thus, a pleader may refer to a preceding cause of action, and by adoption incorporate it into a second cause of action without repetition.² This method of pleading, while convenient and labor-saving, is not without its perils to the pleader. In case the former paragraph in the pleading, or the former cause of action, containing a recital of the essential facts should be insufficient or defective, and for that reason struck out on demurrer, the subsequent part of the pleading adopting and incorporating by reference the stricken part will be defective, in so far as the matter incorporated by reference is essential to a cause of action or defense.

Adopting and incorporating³ pleading, by reference,

⁶ Doll v. Feller, 16 Cal. 432, 433.

⁷ More v. Del Valle, 28 Cal. 170, 173.

⁸ Doll v. Feller, 16 Cal. 432, 433.

⁹ Tracy v. Harmon, 17 Mont. 465, 43 Pac. 500.

¹ Day v. Clarke's Adm'r, 8 Ky. (1 A. K. Marsh.) 521.

² Hughes v. Farmers' Ins. Co., 2

Cleveland Law Rep. 125, 4 Ohio Dec. 412.

³ Mason v. Jones, 7 D. C. 247; Holt v. Nielson, 37 Utah 566, 109 Pac. 470.

Defect in pleading in failure to set out claim with precision, not cured by such reference and incorporation.—Teal v. Lyons, 30 La. Ann. 1140.

filed by a co-defendant,⁴ or a co-plaintiff,⁵ or a pleading filed in another action in the same court,⁶ although such former action is not the foundation of the instance action,⁷ is held to be a sufficient pleading of the facts referred to, adopted and thus incorporated. But the reference must be certain, definite and specific, not a mere general reference to what was pleaded in such other action.⁸ When the pleading thus referred to and adopted by incorporation contains a general denial, the pleading adopting it by reference will be held to contain a general denial, even where pleaded to a supplemental complaint bringing in the party thus pleading, and a general denial by such party does not otherwise appear.⁹ But an answer of a defendant adopting an answer previously filed by a co-defendant "except wherein this answer conflicts therewith," is insufficient, because it fails definitely to designate the portion of the co-defendant's answer which is adopted.¹⁰ And a reference in a reply to an answer,—in those jurisdictions in which a reply is permitted,—to a

⁴ *Louisville & N. R. Co. v. Hall*, 131 Ala. 161, 32 So. 603; *Collins v. Brown*, 19 Idaho 360, 114 Pac. 671; *Case v. Ingle*, 3 Ind. Tr. 527, 61 S. W. 994; *Hooker v. Worthington*, 134 N. C. 283, 46 S. E. 726; *Alliance Milling Co. v. Eaton* (Tex. Civ. App.), 23 S. W. 455; *Karns v. Allen*, 135 Wis. 48, 15 Ann. Cas. 543, 115 N. W. 357.

After dismissal of former action as to such co-defendant.—*Alliance Milling Co. v. Eaton* (Tex. Civ. App.), 23 S. W. 455.

⁵ *Olcott v. International & G. N. R. Co.* (Tex. Civ. App.), 28 S. W. 728.

Intervenor may make allegations in plaintiff's complaint his own by reference and adoption.—*Texarkana & Ft. S. R. Co. v. Hartford*

Ins. Co., 17 Tex. App. 498, 44 S. W. 533.

⁶ *Mason v. Jones*, 7 D. C. 247; *Westfield Gas & Milling Co. v. Nobbsville & E. Gravel-Road Co.*, 13 Ind. App. 481, 55 Am. St. Rep. 244, 41 N. E. 955; *Wells v. Stratton*, 1 Tenn. Ch. 328; *Holt v. Nielson*, 37 Utah 566, 109 Pac. 470.

⁷ *Westfield Gas & Milling Co. v. Nobbsville & E. Gravel-Road Co.*, 13 Ind. App. 481, 55 Am. St. Rep. 244, 41 N. E. 955.

⁸ *Russell v. Greenwade*, 9 Ky. L. Rep. 163, 4 S. W. 295.

⁹ *Karns v. Allen*, 135 Wis. 48, 15 Ann. Cas. 543, 115 N. W. 357.

¹⁰ *Bexar Building & Loan Assoc. v. Lockwood* (Tex. Civ. App.), 54 S. W. 253.

As to definiteness and certainty in a pleading, see, post, § 733.

part of the answer to which the reply is made, and incorporating it by adoption, is bad, because it makes the answer a part of the reply ¹¹

§ 731. **AMBIGUITY—NATURE OF VICE AND REMEDY.** Every statement of facts in a pleading should be direct and positive, and not ambiguous or equivocal. Ambiguity in a pleading is the quality or state of being ambiguous; doubtfulness or uncertainty of signification.¹ Such a defect in a pleading does not render it a nullity; the defect, to be taken advantage of, must be objected to.² In some of the jurisdictions with the reformed judicature this is done by a motion to make more definite and certain; but in California,³ Montana,⁴ and perhaps elsewhere, a demurrer lies for ambiguity and uncertainty. Failure of a pleading to set out irrelevant and unnecessary matter⁵ does not render a pleading ambiguous;⁶ and a demurrer for ambiguity and uncertainty will not lie on the ground that the proofs might show some of the damages barred by limitation.⁷ A statement of a cause of action resembling the common-law count of assumpsit, is not demurrable for ambiguity under the procedural codes, in some jurisdictions.⁸ Alleging matters of inducement leading up to and showing the basis of a contract sued on, do not render the pleading ambiguous;⁹ but alleging the delivery of a horse to the defendant to be sold at a named price, for which the defendant agreed to sell the horse, and alleging a sale of the horse by the defendant, without

¹¹ *Atchison v. Lee*, 75 Ind. 132.

¹ *Kraner v. Halsey*, 82 Cal. 209, 212, 22 Pac. 1137.

² *Rutan v. Walters*, 116 Cal. 403, 43 Pac. 385.

³ See *Tomlinson v. Monroe*, 41 Cal. 94; *Durrell v. Dooner*, 119 Cal. 411, 51 Pac. 678; *Meacham v. Bear Valley Irr. Co.*, 145 Cal. 606, 68 L. R. A. 600, 79 Pac. 281.

⁴ *Reed v. Poindexter*, 16 Mont. 294, 40 Pac. 596.

⁵ As to pleading irrelevant and unnecessary matter, see, ante, § 728.

⁶ *Kyle v. Craig*, 125 Cal. 107, 57 Pac. 791.

⁷ *Doe v. Sanger*, 78 Cal. 150, 20 Pac. 366.

⁸ *Henry Investment Co. v. Semonian*, 40 Colo. 269, 90 Pac. 682.

⁹ *Henke v. Eureka Endowment Assoc.*, 100 Cal. 429, 34 Pac. 1089.

setting out the price for which the horse was sold, is ambiguous and uncertain.¹⁰

Pleading stating enough to render it easy of comprehension and free from a reasonable doubt, is not ambiguous;¹¹ and an ambiguous complaint stating facts sufficient to warrant a recovery on any theory, will be sustained.¹²

§ 732. ARGUMENTATIVENESS AND INFERENCE. This vice in pleading consists in leaving the affirmative statement of ultimate facts to argument and inference from the allegations set out, and generally pertains to traverses where facts are set out by way of inducement from which a general denial is to be drawn by argument or inference, only, instead of following up the explanatory matter or facts with a direct denial;¹ but is common alike to complaints and answers.² Argumentative or inferential pleading is unallowable,³ particularly where objected to, and usually such statements are stricken out on motion;⁴ for the general rule of pleading requires that facts be put in issue by a direct allegation only, in such form that the opposite party can take issue directly upon them.⁵ Thus, in an action for damages for the breach of a contract, there must be a distinct affirmative allegation as to the contract and its terms, with an averment of a breach thereof; the place of such an allegation can not be supplied by argument or inference from exhibits

¹⁰ Tomlinson v. Monroe, 41 Cal. 94.

¹¹ Salmon v. Wilson, 41 Cal. 595; Henke v. Eureka Endowment Assoc., 100 Cal. 429, 34 Pac. 1089; Jones v. Iverson, 131 Cal. 101, 63 Pac. 135.

¹² Wahle v. Great Northern R. Co., 41 Mont. 326, 109 Pac. 713.

¹ See Stephen on Pleading (Williston's ed.), 208.

² See Kelly v. Rogers, 21 Minn. 146.

³ Kinney v. Consolidated Virginia Min. Co., 4 Sawy. 382, Fed. Cas. 7827.

⁴ Williamson v. Post, 14 Ind. 569.

⁵ Kinney v. Consolidated Virginia Min. Co., 4 Sawy. 382, Fed. Cas. No. 7827.

attached to the complaint.⁶ This rule, however, applies to and controls only as to those things necessary to be affirmatively pleaded, to enable the opposing party to know what the issues are and to prepare his pleading and evidence to meet them; the failure of a complaint to specifically allege matters of fact peculiarly within the knowledge of the defendant does not lay it open to the objection of ambiguity,⁷ because such matters and facts are not required to be specifically pleaded.⁸ Thus, a complaint failing to specifically inform a defendant corporation when it made, dug, and constructed its works involved in the subject-matter of the action, leaving that fact to argument or inference, the complaint was held to be sufficient, because the omitted fact was peculiarly within the defendant corporation's knowledge.⁹

§ 733. CERTAINTY, DIRECTNESS AND PARTICULARITY. It is essential to a good pleading that there shall be certainty, directness and particularity in the statement of the cause of action or defense; it being a cardinal rule of pleading that the facts upon which the issues in the controversy rest shall be directly and certainly and specifically alleged;¹ and the allegations in the pleading must be in

⁶ Ahlers v. Smiley, 11 Cal. App. 343, 104 Pac. 997.

⁷ As to ambiguity, see, ante, § 731.

⁸ See, ante, § 718.

⁹ Donahue v. Stockton Gas & Electric Co., 6 Cal. App. 276, 92 Pac. 196.

¹ CAL.—Denver v. Burton, 28 Cal. 549; Joseph v. Halt, 37 Cal. 250, 256; Campbell v. Jones, 38 Cal. 507. IDAHO—McLean v. Lewiston, City of, 8 Idaho 472, 69 Pac. 478. MICH.—Addison v. Lake Shore & M. S. R. Co., 48 Mich. 155, 12 N. W. 42; Creen v. Michigan Cent. R. Co., 168 Mich. 104, Ann. Cas. 1913C, 98, 133 N. W. 956.

ORE.—Giroux Amalgamator Co. v. White, 21 Ore. 435, 28 Pac. 390.

Admitting certain facts in specified paragraph of complaint, and then denying each allegation in such paragraph, except as specifically admitted, does not render answer indefinite and uncertain.—Kidder County v. Foye, 10 N. D. 424, 87 N. W. 984.

Allegation of facts claimed to have been stated, sufficiently alleged if they can be read from the pleading with reasonable certainty, although allegation uncertain, incomplete and defective.—Modern Steel Structural Co. v. English Constr. Co., 129 Wis. 31, 108 N. W. 70.

unequivocal language,² with but a single meaning,³ and not by way of recital,⁴ and in no case should there be

Capability of mere certainty does not necessarily render a pleading fatally defective.—*Sanford v. Lichtenberger*, 62 Neb. 501, 87 N. W. 305.

Certainty to a common interest is all that is required.—*Merkle v. Bennington Township*, 68 Mich. 133, 35 N. W. 846.

Demurrer does not lie to all indefiniteness and uncertainty.—*Ramsy County Commrs. v. Brisbin*, 17 Minn. 451.

Every fact to be proved to maintain action, or that defendant may controvert, must be directly alleged.—*Griggs v. St. Paul, City of*, 9 Minn. 246.

Express promise can not be implied; it must be directly alleged.—*Joseph v. Holt*, 37 Cal. 250, 256.

Pleading advising adversary of exact claim made is sufficiently certain, although all material allegations are required to be made with such certainty as to leave no doubt as to the matter pleaded.—*McCrary v. Lake City Electric Light Co.*, 139 Iowa 548, 117 N. W. 964.

To enable defendant to make defense to the action.—*McLean v. Lewiston, City of*, 8 Idaho 472, 69 Pac. 478.

Uplands owned by person claiming to be entitled to purchase certain tidelands under the statute, must be designated in complaint.—*Washington Dredging & Imp. Co. v. Canal Coal Co.*, 45 Wash. 462, 88 Pac. 836.

² *Moore v. Besse*, 30 Cal. 570; *Gates v. Lane*, 44 Cal. 392; *Batterson v. Chicago & G. T. R. Co.*, 49 Mich. 184, 13 N. W. 508.

Denials certain and specific as

the allegations they are intended to meet, controverting in spirit the adverse pleading, held to be sufficient to raise an issue.—*Moore v. Murray*, 30 Mont. 13, 75 Pac. 515.

Essential facts upon which the issues involved depend must be stated with clearness and precision.—*Gates v. Lane*, 44 Cal. 392. See *Burkett v. Griffith*, 90 Cal. 532, 55 Am. St. Rep. 151, 13 L. R. A. 707, 27 Pac. 527.

Minority shown sufficiently clearly by an allegation that deceased left seven minor children, to wit, the plaintiff, then about twenty years and ten months old, and six others not named.—*Heydenfeldt v. Jacobs*, 107 Cal. 373, 40 Pac. 492.

Uncertainty in pleading deferred.—*Kraner v. Halsey*, 82 Cal. 209, 213, 22 Pac. 1137.

³ *Schwindt v. Lane Potter Lumber Co.*, 40 Mont. 537, 135 Am. St. Rep. 639, 107 Pac. 818; *Barrie v. Carolan*, 111 Fed. 134.

Negligent shutting off of water causing explosion of stove charged, alleging that plaintiff was so injured and mentally disturbed that, being with child, she had a miscarriage and became sick, and suffered great pain and injury, pleading is subject to demurrer on the ground of duplicity and uncertainty, it being impossible to determine from the allegations whether plaintiffs cause of action is barred on physical injury and mental disturbance, or on mental disturbance alone.—*Hasty v. Moulton Water Co.*, 39 Mont. 310, 102 Pac. 568.

⁴ *Denver v. Burton*, 28 Cal. 549. **Matters of substance must be**

anything left to argument⁵ and inference.⁶ An allegation of facts which may, but does not necessarily, point to an ultimate fact material to be alleged, does not amount to an averment of that fact.⁷ But mere recitals by way of inducement, or giving the historical steps in the transaction leading up to the cause of action or defense set out, where the allegations of that cause are otherwise clear and distinct and sufficient, does not render the pleading uncertain.⁸

*Theory of the case*⁹ of the pleader is one of the things that must be clearly and unequivocally stated, because the opposite party is entitled to know on which of two or more theories a cause of action is prosecuted or defended.¹⁰ Thus, a complaint which clearly indicates that the plaintiff has and sets forth a single demand only, but does so with suggestions that the defendant is liable as

presented by direct averment and not by way of recital.—*Burkett v. Griffith*, 90 Cal. 532, 55 Am. St. Rep. 151, 13 L. R. A. 707, 27 Pac. 527.

⁵ *Barrie v. Carolan*, 111 Fed. 134.

As to argument and inference, see, ante, § 732.

⁶ *Moore v. Besse*, 30 Cal. 570; *Campbell v. Jones*, 38 Cal. 507; *Barrie v. Carolan*, 111 Fed. 134.

Breach of contract to repair machine charged, an allegation that plaintiff will be required to expend a specified sum to put the machine in good condition, equivalent to direct allegation of the reasonable necessary cost.—*King v. Nichols & Shepard Co.*, 53 Minn. 453, 55 N. W. 604.

Material allegations are not to be inferred from doubtful or obscure language.—*Campbell v. Jones*, 38 Cal. 507.

—This rule does not apply to matters peculiarly within the knowledge of the other party.—

Donahue v. Stockton Gas & Electric Co., 6 Cal. App. 276, 92 Pac. 196.

Nothing to be left for inference or surmise by the court.—*Gates v. Lane*, 44 Cal. 392.

Unconstitutionality of statute need not be pleaded with any greater certainty than other issues; whether material constitutional question presented is to be determined by construing the pleading according to usual methods.—*Union Pac. R. Co. v. Abilene, City of*, 78 Kan. 820, 98 Pac. 224.

⁷ *Ahlers v. Smiley*, 11 Cal. App. 343, 104 Pac. 997; *Stead v. Curtis*, 123 C. C. A. 507, 205 Fed. 134.

⁸ *Nevin v. Thompson*, 4 Cal. Unrep. 390, 35 Pac. 160.

⁹ As to theory of the case, see, ante, §§ 527-534.

¹⁰ *Schwindt v. Lane Potter Lumber Co.*, 40 Mont. 537, 135 Am. St. Rep. 639, 107 Pac. 818. See *Hosty v. Moulton Water Co.*, 39 Mont. 310, 102 Pac. 568.

original debtor, as grantor, or as tort-feasor, is vulnerable to a special demurrer on the ground of uncertainty.¹¹

§ 734. CONCLUSIVENESS OF ADMISSION OR ALLEGATION AGAINST PARTY. In those cases in which a person to an action makes solemn admissions or allegations against his interests in a pleading to which he swears,¹ in the absence of a mistake on his part or on the part of his counsel, who inserted them in such pleading,² such admissions or allegations must be treated as established facts;³ are tantamount to specific findings duly made by the court;⁴ and will be binding upon the party throughout all subsequent stages of the cause,⁵ both in the trial court and on appeal, so long as they remain a part of the record;⁶ although it has been said that a party is not bound by allegations in his verified pleadings upon which issue is not joined and evidence not taken.⁷ A party is also bound by his theory of the case and its legitimate consequences.⁸

Admissions by party, in a pleading, of facts stated in a pleading of his adversary, are denominated "solemn admissions,"⁹ and, as against him, are conclusive evidence of such facts,¹⁰ because the parties to an action

¹¹ *Schwindt v. Lane Potter Lumber Co.*, 40 Mont. 537, 135 Am. St. Rep. 639, 107 Pac. 818.

¹ *Dodge v. Chambers*, 43 Colo. 366, 96 Pac. 178.

² *Lane Implement Co. v. Lowder*, 11 Okla. 61, 65 Pac. 926.

³ *Rogers v. Brown*, 15 Okla. 524, 86 Pac. 443.

⁴ *Miller v. Head Camp*, 45 Ore. 192, 77 Pac. 83.

⁵ *Dodge v. Chambers*, 43 Colo. 366, 96 Pac. 178; *Losch v. Pickett*, 36 Kan. 216, 12 Pac. 822.

Alleging defendant a corporation, plaintiff can not deny corporate capacity of defendant, and show it a partnership.—*Dodge v.*

Chambers, 43 Colo. 366, 96 Pac. 178.

Fact in different counts does not vary the rule, or entitle him to any benefit to be derived therefrom.—*Losch v. Pickett*, 36 Kan. 216, 12 Pac. 822.

⁶ *Rogers v. Brown*, 15 Okla. 524, 86 Pac. 443.

⁷ *Groth v. Kersting*, 23 Colo. 213, 47 Pac. 393.

⁸ *State ex rel Sullivan v. Schnitger*, 16 Wyo. 479, 95 Pac. 698.

⁹ *Knowles v. New Sweden Irr. Dist.*, 16 Idaho 217, 235, 101 Pac. 81, 87.

¹⁰ *Blankman v. Vallejo*, 15 Cal. 638; *Joshua Hendy Mach. Works*

are bound by their own pleadings, and are not allowed to contravert their own averments.¹¹ There is a like

v. Pacific Cable Const. Co., 99 Cal. 421, 33 Pac. 1084; *Knowles v. New Sweden Irr. Dist.*, 16 Idaho 217, 235, 101 Pac. 81, 87.

As to admissions in answer in equity, as evidence against an infant defendant, see note 4 Ann. Cas. 403.

¹¹ CAL.—*Wilcoxson v. Burton*, 27 Cal. 228, 87 Am. Dec. 66; *Mulford v. Estudillo*, 32 Cal. 131; *People v. Stockton & C. R. Co.*, 49 Cal. 414; *Turner v. White*, 73 Cal. 299, 14 Pac. 794; *Murphy v. Coppleters*, 136 Cal. 317, 68 Pac. 970. COLO.—*Kutcher v. Love*, 19 Colo. 542, 36 Pac. 152. KAN.—*Phoenix Ins. Co. v. Weeks*, 45 Kan. 751, 26 Pac. 410; *Nequette v. Green*, 81 Kan. 569, 106 Pac. 270. MONT.—*Wulff v. Manuel*, 9 Mont. 276, 279, 23 Pac. 723; judgment reversed on another point in *Manuel v. Wulff*, 152 U. S. 505, 38 L. Ed. 532, 14 Sup. Ct. Rep. 651. NEV.—*Manning v. Bowman*, 26 Nev. 451, 69 Pac. 995. OKLA.—*Rogers v. Brown*, 15 Okla. 524, 86 Pac. 443; *Herbert v. Wogg*, 27 Okla. 674, 117 Pac. 209. ORE.—*Jennings v. Oregon Land Co.*, 48 Ore. 287, 86 Pac. 367; *Fagan v. Wiley*, 49 Ore. 480, 90 Pac. 910. S. D.—*Keine v. Bank of Edgemont*, 22 S. D. 630, 119 N. W. 1003. UTAH.—*Busby v. Century Gold Min. Co.*, 27 Utah 231, 75 Pac. 725; *Hague v. Jaub County Mill & Elevator Co.*, 37 Utah 290, 107 Pac. 249. WASH.—*Tingley v. Bellingham Bay Boom Co.*, 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055; *Goldwater v. Burnside*, 22 Wash. 215, 60 Pac. 409; *Scott v. Matthews*, 25 Wash. 486, 65 Pac. 756; *Irwin v. Buffalo Pitts County*, 39 Wash. 346, 81 Pac. 489. WYO.—

Pardee v. Kuster, 15 Wyo. 368, 89 Pac. 572, 91 Pac. 386.

Admission in complaint, in action to recover balance for goods sold and delivered, that a specified sum had been paid on account, where not denied by the defendant, binds plaintiff, and where that amount is more than the price agreed to be paid, there can be no recovery.—*Joshua Hendy Mch. Works v. Pacific Cable Const. Co.*, 99 Cal. 421, 33 Pac. 1084.

Otherwise if the allegation as to payment is denied, see footnote 7, this section.

Admission of citizenship in answer of person through whom plaintiff denied title to a mining claim was a citizen, defendant can not thereafter move for nonsuit on ground plaintiff's title invalid because such person was an alien.—*Wulff v. Manuel*, 9 Mont. 276, 279, 93 Pac. 723; judgment reversed on another point in *Manuel v. Wulff*, 152 U. S. 505, 38 L. Ed. 532, 14 Sup. Ct. Rep. 651.

Claiming an insurance policy on ground substituted as beneficiaries; estopped to also claim to be entitled as heirs.—*Anderson v. Grosbeck*, 26 Colo. 3, 55 Pac. 1086.

Designating as defense a pleading, party is afterward estopped from asserting that it is a counterclaim, and entitled to be treated as such.—*Babcock v. Maxwell*, 21 Mont. 507, 54 Pac. 943.

Inconsistent causes of action set up, party not estopped by inconsistent statements therein, where not required to elect on which cause of action he will rely.—

binding effect in the pleadings, or the pleadings and findings, in a former action, which his pleadings in the instance action set out and aver.¹² But it has been said admissions and allegations in an abandoned pleading, or a pleading suspended by an amended pleading which takes the place of the original pleading, are thereafter no longer absolutely binding upon the pleader;¹³ although it has been held, on the other hand, that a party, having once solemnly admitted a fact, and made that admission a matter of record, he can not, after such admission, by merely withdrawing the paper containing the admission from the files of the court, deny such admission, and escape its consequences.¹⁴ Admissions in pleadings bind the party making them only, not the co-parties.¹⁵

Inconsistent allegations in a pleading, it is to be construed most strongly against the pleader, and he will be

Hulst v. Doerstler, 11 S. D. 14, 75 N. W. 270.

Interest from certain date demanded party can not collect interest from a prior date.—Phoenix Ins. Co. v. Weeks, 45 Kan. 751, 26 Pac. 410.

Relief from admission regarding a written contract made by party in pleading, will not be granted on the ground that he did not have an opportunity to examine the contract until introduced in evidence where no application was made for an order of inspection under the statute.—Fagan v. Wiley, 49 Ore. 480, 90 Pac. 910.

¹² Lillis v. Emigrant Ditch Co., 95 Cal. 553, 30 Pac. 1108.

As to admissibility and conclusiveness against pleader of admissions in pleading in a former action, in a subsequent action with strangers, note 18 Ann. Cas. 79.

¹³ Reemsnyder v. Reemsnyder, 75 Kan. 565, 89 Pac. 1014; Ma-

honey v. Butte Hardware Co., 19 Mont. 377, 48 Pac. 545.

As to admissibility against pleader of allegations in a pleading suspended by amendment, see notes 18 Ann. Cas. 83, Ann. Cas. 1913A, 1132.

Abandoned before trial without objection.—Mahoney v. Butte Hardware Co., 19 Mont. 377, 48 Pac. 545.

Court takes into consideration admissions made by party against interest in a pleading, in the absence of mistake on his part or of the attorney who inserted them in such pleading, in passing on the sufficiency of a subsequent amended petition, and will treat them as admitted facts in the case.—Lane Implement Co. v. Lowder, 11 Okla. 61, 65 Pac. 926.

¹⁴ McDonald v. Grice, 9 Kan. App. 657, 58 Pac. 1035.

¹⁵ Graham v. Smart, 42 Wash. 205, 84 Pac. 824.

bound by those allegations against his interests;¹⁶ and an admission in an answer that a note was paid at maturity, controls a subsequent direct averment that it was not so paid.¹⁷

Ultimate facts admitted on the record, probative facts to establish or overcome those facts are not proper subjects of judicial action, and to receive them on the subject is error;¹⁸ although there are cases to the effect that evidence offered by the party which contradicts the admission is immaterial merely, and does not affect the force of the admission.¹⁹ However, it seems that the adversary is not estopped to rely upon such admission by introducing evidence to establish and explain the fact admitted.²⁰ Admission as to liability for a portion of the time set out in an action to recover for services rendered to the defendant, but denying liability for the balance of the time set forth in the complaint, is binding upon the defendant, notwithstanding the fact that the testimony of the witnesses produced by the plaintiff is inconsistent with such admission.²¹

But pleading performance of all the conditions precedent to entitle the plaintiff to sue upon a fire insurance policy, does not preclude him from showing a waiver of the condition in respect to chattel mortgages;²² pleading defendant's ratification of an agent's contract, does not amount to an admission of knowledge that the written

¹⁶ Blerer v. Fritz, 32 Kan. 329, 4 Pac. 284; Mitchell v. Ripley, 5 Kan. App. 818, 49 Pac. 153.

¹⁷ Evidence of nonpayment at maturity not admissible until the inconsistency in the pleading has been removed by amendment.—Irwin v. Buffalo Pitts County, 39 Wash. 346, 81 Pac. 849.

¹⁸ Mulford v. Estudillo, 32 Cal. 131; White v. Smith, 79 Kan. 96, 98 Pac. 766; Hursh v. Starr, 6

Kan. App. 8, 49 Pac. 618; Horn v. Martinho, 7 Cal. App. 204, 94 Pac. 79; Landigan v. Mayer, 32 Ore. 245, 67 Am. St. Rep. 521, 51 Pac. 649.

¹⁹ Goldwater v. Burnside, 22 Wash. 215, 60 Pac. 409.

²⁰ Burr v. Maclay Rancho Water Co., 160 Cal. 268, 116 Pac. 715.

²¹ Manning v. Bowman, 26 Nev. 451, 69 Pac. 995.

²² Raulet v. Northwestern Nat. Ins. Co., 157 Cal. 213, 107 Pac. 292.

ratification given to the agent contained an agreement for the payment of his commission,²³ and a complaint to recover a partial payment made on the purchase-price of land, alleging as a ground therefor a failure of title, does not estop the plaintiff subsequently to contend that the terms demanded of him were not those agreed upon in the contract of sale.²⁴ The caption to a complaint in replevin attaching to the defendant's name the words "deputy sheriff," without the connecting word "as," does not estop the plaintiff to show that the defendant was not a deputy sheriff, the presumption being that the words were merely descriptio personæ;²⁵ but in an action by a seller of produce for nonperformance by the buyer, setting up as an excuse for nonperformance on his part an attachment levied by the defendant, an answer alleging that a writ was placed in the hands of a designated person as constable for service, and that such person, as constable, under the direction of the defendant, made the levy, precludes the defendant to question the official character of the person acting as constable.²⁶

Demurrer admits facts well pleaded, but in applying the rule above laid down a distinction is drawn between admissions by demurrers filed and solemn admissions against interest in a verified pleading filed. Thus, a demurrer to a complaint stating that it is based on the ground that one of the causes of action is in contract and one of them in tort, does not necessarily preclude the defendant from contending that the demurrer is good because both of the causes of action are in tort;²⁷ but defendant's demurrer to a complaint on the ground that the husband of the plaintiff is not joined as a party

²³ Conlin v. Osborn, 161 Cal. 659, 120 Pac. 755.

²⁴ Bridge v. Calhoun, Denny & Erving, Inc., 57 Wash. 272, 106 Pac. 762.

²⁵ Greig v. Clement, 20 Colo. 167, 37 Pac. 960.

²⁶ La Follette v. Mitchell, 42 Ore. 465, 95 Am. St. Rep. 780, 69 Pac. 916.

²⁷ Smith v. Day, 39 Ore. 531, 64 Pac. 812, 65 Pac. 1055.

plaintiff being sustained, the defendant can not thereafter object to the amended complaint bringing in the husband as a plaintiff, on the ground of insufficiency to warrant recovery by either plaintiff, because it fails to show that the husband has any interest in the litigation.²⁸

Illustrations of application of the rule, without attempting to be either exhaustive or selective, may be noted as follows: In an action of claim and delivery to recover certain steers claimed by defendant under a chattel mortgage, an answer by the defendant alleging that defendant took possession of the steers and foreclosed the mortgage on plaintiff's default in making the payment agreed, estops the defendant to thereafter claim that he had not taken possession of the steers described in the complaint;²⁹ in an action on a loan alleged to have been made on the condition that it be repaid within a reasonable time, where the answer admits that the loan is due, the defendant can not thereafter be heard to contend that a reasonable time for repayment has not yet expired;³⁰ in action to quiet the title to real property in which the pleadings show ownership in one of the defendants at a specified date, such defendant can not be permitted to testify, on the trial, that the land never belonged to him;³¹ corporation answer alleging that a specified agent did a certain thing, on the trial the corporation can not deny the authority to do that thing,³² because an admission of the agency is a ratification of the act;³³ deed charged to have been procured by fraud, praying for its cancellation and for an accounting with

²⁸ Harrington v. Gordon, 42 Wash. 692, 80 Pac. 187.

²⁹ Kime v. Bank of Edgemont, 22 S. D. 630, 119 N. W. 1003.

³⁰ Busby v. Century Gold Min. Co., 27 Utah 231, 75 Pac. 725.

³¹ Turner v. White, 73 Cal. 299, 14 Pac. 794.

³² People v. Stockton & C. R. Co., 49 Cal. 414. See Murphy v. Coppieters, 136 Cal. 317, 68 Pac. 970; Tingley v. Bellingham Bay Boom Co., 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055.

³³ Tingley v. Bellingham Bay Boom Co., 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055.

the grantee as to moneys received for lots sold from the land, plaintiff can not abandon the theory of fraud and insist that the deed be treated as a mortgage, and recover, on that theory, title to lots from persons to whom they were sold, they being innocent purchasers without notice;⁸⁴ demand for deed by plaintiff being admitted in answer in an action for damages for breach of contract to convey, the defendant is estopped to thereafter question the sufficiency of the demand;⁸⁵ execution of note set out in complaint admitted in answer, defendant can not thereafter claim that the note was changed after execution and delivery;⁸⁶ will pleaded by defendant in an action to compel specific performance to show that defendant, under the will, had no power to convey, defendant can not afterwards dispute the existence, authenticity and terms of such will,⁸⁷ and the like.

§ 735. **CONSISTENCY AND REPUGNANCY—NEGATIVE PREGNANT.** Among the rules of pleading which tend to prevent obscurity and confusion therein, one of the first and most important requires that a pleading must not be unintelligible, or, in the technical language of pleading, insensible, nor inconsistent in its allegations,—that is, repugnant.¹ The term “repugnancy,” used in connection with a pleading, applies to an allegation inconsistent in itself, and is usually characterized as “uncertainty,” these two terms being frequently used interchangeably, although they are not exactly synonymous.² Thus, a complaint in trespass on land averring the taking and carrying away certain timber, then lying in a designated place, for the completion of a house then lately built, is

⁸⁴ *Herbert v. Wagg*, 27 Okla. 674, 117 Pac. 209.

As to binding character of theory of case, see footnote 8, this section.

⁸⁵ *Jennings v. Oregon Land Co.*, 48 Ore. 287, 86 Pac. 367.

⁸⁶ *White v. Smith*, 79 Kan. 69, 98 Pac. 766.

⁸⁷ *Niquette v. Green*, 81 Kan. 569, 106 Pac. 270.

¹ See *Stephen on Pleading* (Williston's ed.), 414.

² *Swan v. United States*, 3 Wyo. 151, 9 Pac. 931.

bad for repugnancy, because timber could not be taken for the completion of a house already built.³ Likewise a complaint alleging a grant of rent out of a term of years, and averring that by reason thereof plaintiff was seized of the demesne as a freehold for the term of his life, is bad for repugnancy, because the grant of rent for a term does not create a freehold.⁴ So, also, is the vice of repugnancy present in those pleadings in which a sense is annexed to words absolutely inconsistent therewith, or being apparently so, where not accompanied by anything to explain or define them.⁵

An exception to the rule as above stated regarding repugnancy is to be noted in those cases in which the second allegation, which creates the repugnancy, is merely superfluous and redundant matter,⁶ which can be rejected from the pleading without materially altering the general sense and effect thereof, and may for that reason be rejected, particularly where laid under a *vide licit*, under the maxim *utile per inutile non vitiatur*—the useful is not vitiated by the useless.⁷

Negative pregnant is a vice in pleading which usually appears in traverses in an answer or in a reply, where replies by plaintiff are allowed, and consists in such a form of a negative expression as does or may carry with it an affirmative of the allegation it is sought to deny.⁸ Thus, where the complaint charged a trespass in entering the plaintiff's dwelling-house, to the defendant's plea that plaintiff's daughter gave him permission to enter,

³ *Neville v. Soper*, 1 Salk. 213, 91 Eng. Repr. 190.

⁴ *Butt's Case*, 7 Co. 23a, 25a, 77 Eng. Repr. 445, 448.

⁵ 1 Chitty on Pleading (16th Am. ed.), p. 238.

⁶ As to superfluous and unnecessary matter in a pleading, see, ante, § 728.

⁷ *King, The, v. Stevens*, 5 East

244, 255, 102 Eng. Repr. 1063, 1067; *Wyat v. Aland*, 1 Salk. 324, 325, 91 Eng. Repr. 287.

See Stephen on Pleading (Williston's ed.), 415.

⁸ *Nobach v. Scott*, 20 Idaho 558, 119 Pac. 295; *Lemke v. Lemke*, 78 Neb. 525, 111 N. W. 138.

See 1 Chitty on Pleading (16th Am. ed.), pp. 613, 614.

and that he entered by that license, a reply that defendant did not enter by his daughter's license, was held to be a negative pregnant,⁹ because the traverse might imply or carry with it the affirmative that the license was given, though the defendant did not enter by that license, and for that reason is pregnant with the admission that a license was given. The plaintiff should have traversed the entry by itself, or the license by itself, not both together.¹⁰ This vice, from its very nature, is not to be found in a simple general denial regular in form, but is frequently met with in special denials, and especially in those cases in which the pleader uses the exact language of the allegation which he seeks to traverse,—as is aptly shown in the illustration just given. Another apt illustration is where a defendant pleads in bar a release made since the date of the process, and the plaintiff replies that the supposed writing is not his act since the date of the process, which reply is pregnant with the admission that plaintiff gave such a release before the date of the process—which would be an equally effectual bar.¹¹ This vice is far too frequently found in answers and replies which seek to traverse an allegation *ipsissimus verbis*—in the language thereof, simply negating that language, which is never permissible.¹² This form of

⁹ *Myn v. Cole*, Cro. Jac. 87, 79 Eng. Repr. 75. See *Bennett v. Alcott*, 2 T. R. 166, 100 Eng. Repr. 90.

¹⁰ *Stephen on Pleading* (Williston's ed.), p. 419.

¹¹ *Gould on Pleading*, ch. VI, § 30; *Bliss on Code Pleading*, § 332.

¹² See: CAL.—*Blankman v. Vallejo*, 15 Cal. 638; *Nolan v. Hentig*, 138 Cal. 281, 71 Pac. 440; *Schroeder v. Mauzy*, 16 Cal. App. 443, 118 Pac. 459. COLO.—*James v. McPhee*, 9 Colo. 486, 13 Pac. 535; *Grand Valley Irr. Co. v. Leshner*, 28 Colo. 273, 65 Pac. 44; *Tole v. People*, 6 Colo. App. 202, 40 Pac. 471;

Brennen v. State Bank, 10 Colo. App. 368, 50 Pac. 1076; *Sargent v. Chapman*, 12 Colo. App. 529, 56 Pac. 194. KY.—*Hendrick v. Robert Mitchell Furniture Co.*, 16 Ky. L. Rep. 769, 29 S. W. 750. MONT.—*Harris v. Shontz*, 1 Mont. 212; *Toombs v. Hornbuckle*, 1 Mont. 286; *Bach, Cory & Co. v. Montana Lumber & Produce Co.*, 15 Mont. 345, 39 Pac. 291; *Edgerton v. Power*, 18 Mont. 350, 45 Pac. 204; *Yank v. Bordeaux*, 29 Mont. 74, 74 Pac. 77; *Bourke v. Butte Electric & Power Co.*, 33 Mont. 267, 83 Pac. 470. NEB.—*Knight v. Denman*, 64

traverse should be scrupulously and studiously avoided; at best it is but a "lazy" and slovenly method of pleading, inartistic and unscientific, and fraught with grave dangers. This same vice, and for the same reason, not infrequently appears in those cases in which the pleader is called upon to traverse an allegation of several facts connected by the copulative conjunction, and there is an effort made to traverse in *haec verbis*, and it is done in such a manner as to admit, by implication, that some of the allegations are true.¹³ In such a case each clause of the allegation should be separately traversed.

Under procedural codes and statutes providing the reformed judicature, in some of the jurisdictions, the doctrine of negative pregnant has been abrogated.¹⁴ And under such codes a cause of action or defense arising out of a transaction may be stated in two or more counts, the allegations in which are inconsistent with each other,¹⁵ provided the one does not render the other false;¹⁶ but

Neb. 814, 90 N. W. 863, 68 Neb. 383, 94 N. W. 622; *Leavitt v. Bartholomew*, 1 Neb. Unof. 756, 764, 93 N. W. 856; *Storey v. Kerr*, 2 Neb. Unof. 568, 89 N. W. 601. N. Y.—*Mitterwallner v. Supreme Lodge Knights & Ladies Golden Star*, 37 Misc. 860, 76 N. Y. Supp. 1001, 38 Misc. 729, 78 N. Y. Supp. 1127. OKLA.—*Spencer v. Turney*, 5 Okla. 683, 49 Pac. 1012. ORE.—*Thompson v. Calvin*, 53 Ore. 488, 61 Pac. 201; *Hewitt v. Huffman*, 55 Ore. 57, 105 Pac. 98. UTAH—*Peterson v. Bean*, 22 Utah 43, 61 Pac. 213. WASH.—*Gammon v. Dyke*, 2 Wash. Tr. 266, 5 Pac. 845; *Dillon v. Spokane County*, 3 Wash. Tr. 498, 17 Pac. 889; *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 630, 36 Pac. 763; *Columbia Nat. Bank v. Western Iron & Steel Co.*, 14 Wash. 162, 44 Pac. 145.

¹³ See *Fitch v. Bunch*, 30 Cal. 208; *Fish v. Reddington*, 31 Cal. 185; *Thorn v. New York Central Mills*, 10 How. Pr. (N. Y.) 19; affirmed in *Sherman v. New York Central Mills*, 1 Abb. Pr. (N. Y.) 187; *Young v. Catlett*, 13 N. Y. Super. Ct. Rep. (6 Duer) 437; *Scoville v. Barney*, 4 Ore. 288.

¹⁴ *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454; affirmed, 74 Mo. 77; *O'Brien v. Seattle Ice Co.*, 43 Wash. 217, 86 Pac. 399.

¹⁵ *Stockton Combined Harvester & Agricultural Works v. Glenn Falls Ins. Co.*, 121 Cal. 167, 53 Pac. 565.

As to right to plead inconsistent defenses, see 48 L. R. A. 177.

¹⁶ *Johnson v. Butte & S. Copper Co.*, 41 Mont. 158, 48 L. R. A. (N. S.) 938, 108 Pac. 1057.

where the inconsistent allegations are of such a character that the admission of the one necessarily proves the falsity of the other, they can not stand together.¹⁷

§ 736. **DISTINCTNESS AND POSITIVENESS.** It has already been pointed out that, to be sufficient, a pleading must be free from ambiguity,¹ and should state all the ultimate facts raised by the issues involved so that nothing is left to argument or inference;² that such allegations should be certain and specify the facts particularly.³ To accomplish these ends the pleading must state such ultimate facts as are involved within the issues directly and positively⁴ and unequivocally,⁵ not argumentatively⁶ or disjunctively and in the alternative.⁷ An allegation on information and belief is not sufficient unless the pleader

¹⁷ *Seattle Nat. Bank v. Jones*, 13 Wash. 281, 48 L. R. A. 177, 43 Pac. 331; *Allen v. Olympia Light & P. Co.*, 13 Wash. 307, 310, 43 Pac. 55; *Lamberton v. Shannon*, 13 Wash. 404, 406, 43 Pac. 336; *Pugh v. Oregon Imp. Co.*, 14 Wash. 331, 44 Pac. 547; *Gerber v. Gerber*, 52 Wash. 253, 254, 100 Pac. 735; *Hart-Parr Co. v. Keeth*, 62 Wash. 464, Ann. Cas. 243, 14 Pac. 169.

Inconsistent allegations in a single defense is not a vice that can be reached by demurrer.—*Munn v. Taulman*, 1 Kan. 254, 81 Am. Dec. 508; *Crans v. Frances*, 24 Kan. 750, 754; *Fetzer v. Williams*, 80 Kan. 554, 103 Pac. 77.

¹ See, ante, § 731.

² See, ante, § 732.

³ See, ante, § 733.

⁴ *Ilfeld v. Zeigler*, 40 Colo. 401, 91 Pac. 825; *Byington v. Saline County Commrs.*, 37 Kan. 654, 16 Pac. 105; *Taylor v. Blake*, 11 Minn. 255; *Emmerson v. Botkin*, 26 Okla.

218, 138 Am. St. Rep. 953, 29 L. R. A. (N. S.) 786, 109 Pac. 531.

Obtaining property by duress of imprisonment charged, a complaint averring that defendant well knew that the warrant under which his arrest and imprisonment was made had been issued by an officer who had no jurisdiction to act in the matter is insufficient; it is a mere allegation of knowledge and not a statement of a fact positively.—*Taylor v. Blake*, 11 Minn. 255.

⁵ *Atchison, T. & S. F. R. Co. v. Atchison Grain Co.*, 68 Kan. 585, 1 Ann. Cas. 639, 70 Pac. 933, 75 Pac. 1051.

⁶ *Irwin v. Buffalo Platts County*, 39 Wash. 346, 81 Pac. 849.

As to argumentative pleadings, see, ante, § 732.

Timely objection must be made for the vice of argumentativeness; it can not be made for the first time when the case is called for trial or on the trial.—*Kelly v. Rogers*, 21 Minn. 146.

⁷ See, post, § 737.

distinctly and positively alleges that he believes the ultimate facts thus pleaded to be true.⁸ Fraudulent representations in an exchange of lands sought to be charged, a complaint alleging that the defendant represented to the plaintiff that he was the owner in fee and in possession of his land; that the plaintiff, relying upon such representations, made the exchange; that the defendant had theretofore entered into a contract to sell the land to a third party, who was at the time of such representations in possession of the land as purchaser thereof under such former contract,—sufficiently states that the representations of the defendant were false,⁹ the conclusion of their falsity following as a matter of law from the facts recited.¹⁰

§ 737. DISJUNCTIVE AND ALTERNATIVE ALLEGATIONS—HYPOTHETICAL PLEADING. Another of the rules of good pleading is that allegations and traverses must not be in the disjunctive or be hypothetical.¹ We have already seen that a pleader must state his ultimate facts by distinct direct averments,² and it is elementary that this can not be done by allegations in the disjunctive or alternative; the general rule being that where a pleading is in the alternative, this fact vitiates the instrument,³ un-

⁸ *Swank v. Sweetwater Irr. & Power Co.*, 15 Idaho 353, 98 Pac. 297.

⁹ *Brown v. Linn*, 50 Colo. 443, 115 Pac. 906.

¹⁰ Conclusions of law need not be pleaded. See, ante, § 715.

¹ *Margetts v. Bays*, 4 Ad. & El. 489, 31 Eng. C. L. 223; *Griffiths v. Eyles*, 1 Bos. & P. 413; *Cook v. Cox*, 3 M. & S. 114; *King, The, v. Brereton*, 8 Mod. 330, 88 Eng. Repr. 235; *King, The, v. Morley*, 1 You. & Jer. 221; *Gould v. Lasbury*, 4 Tyrw. 863.

² See, ante, § 736.

³ ALA.—*Highland Ave. & B. R.*

v. Dusenberry, 94 Ala. 413, 10 So. 274 (“would have avoided the collision or would have enabled plaintiff to escape”); *Southern R. Co. v. Bunt*, 131 Ala. 591, 596, 32 So. 507, 509 (engineer caused train to move “with knowledge or notice”). ARK.—*Jett v. Cove*, 5 Ark. (5 Pike) 254 (that “A or B,” not made parties defendant, “is in possession”). CAL.—*Porter v. Herman*, 8 Cal. 619 (defendant collected money “as attorney-in-fact or as agent”). FLA.—*White v. Comp*, 1 Fla. 109. IND.—*Wheeler v. Thayer*, 121 Ind. 64, 22 N. E. 972; *Pittsburgh, C. C. & St. L. R. Co.*

less each alternative states a good cause of action;⁴ that is, a complaint which alleges in the alternative two statements of ultimate facts, one of which statements is sufficient to constitute a good cause of action and the other is insufficient for that purpose, they neutralize each other, and no cause of action is pleaded.⁵ However, it has been said that where the pleader does not seek to recover on two different causes of action, but merely on two combinations of facts, he may state those combinations of facts in the alternative;⁶ or he may narrate a series of facts connected with and explanatory of the transaction constituting the cause of action set out, stating these facts in the alternative, where such recital forms no part of the statement of the ultimate facts constituting the cause of action, and there is a good cause of action stated in the complaint if this alternative narration is excluded,⁷—but each of these last methods of pleading are regarded as both unnecessary and dangerous, tending to confusion, and not to be encouraged.

v. Pick, 165 Ind. 537, 76 N. E. 163. KY.—Com. v. Abell, 29 Ky. (6 J. J. Marshall) 476 (“converted to own use or permitted to escape”); Louisville & N. R. Co. v. Ft. Wayne Electric Co., 108 Ky. 113, 55 S. W. 918 (one or another defendant liable). MD.—Mitchell v. Williamson, 6 Md. 210. MO.—Stone v. Graves, 8 Mo. 148, 40 Am. Dec. 131. N. Y.—Tift v. Tift, 4 Den. 175; Corbin v. George, 2 Abb. Pr. 465 (that defendant made one or other of several representations). UTAH—Rasmussen v. McKnight, 3 Utah 315 (declaration in fraud accomplished “by false reading of the deed or by altering name of grantee before recording”). WASH.—Pugh v. Oregon Imp. Co., 14 Wash. 331, 44 Pac. 547 (if negligence existed, there was also contributory negligence); Gerber

v. Gerber, 52 Wash. 253, 100 Pac. 735 (denying there was a stated account, and if there was it was procured by fraud).

See note Ann. Cas. 1914A, 1239.

⁴ Curran v. Olmstead, 101 Ala. 692, 14 So. 398; Beall v. January, 62 Mo. 434.

⁵ Mountain v. Whitman, 103 Ala. 630, 16 So. 15; Jamison v. King, 50 Cal. 132; Palmer v. Utah & N. R. Co., 2 Idaho 290, 293, 13 Pac. 425; Anderson v. Minneapolis, St. P. & S. S. M. R. Co., 103 Minn. 224, 14 L. R. A. (N. S.) 886, 114 N. W. 1123.

⁶ Taylor Cotton Seed Oil & Gin Co. v. Pumphrey (Tex. Civ. App.), 32 S. W. 225.

⁷ Grblich v. Pittsburgh Iron Ore Co., 119 Minn. 365, Ann. Cas. 1914A, 1238, 138 N. W. 309.

Alternative pleading under procedural codes and statutes providing the reformed system of judicature, is especially provided for in certain cases and as to specified matters, in some of the jurisdictions, as in Kentucky,⁸ Oklahoma,⁹ and perhaps elsewhere.

Hypothetical pleading is bad under the procedural codes, the same as it is by the common-law system of judicature,¹⁰ and is not allowed, either at law or in equity, in the statement of a cause of action.¹¹ It has been said that an hypothetical answer is fatally defective;¹² but this broad assertion seems not to be true in its entirety. Thus, it has been held that where a defendant has, and has stated that he has, no personal knowledge of the cause of action, he may then state that if any such cause of action ever existed it has been satisfied,¹³ and an hypothetical statement or admission may be made in an answer where it is necessary to enable the defendant to plead all his defenses, and the hypothetical pleading does not conflict with or deny the pleading going before.¹⁴ One sued as a partner may deny that a partnership existed, and then plead that if a partnership existed, the plaintiff

⁸ *Brown v. Illinois Cent. R. Co.*, 100 Ky. 525, 38 S. W. 862; *Louisville & N. R. Co. v. Wyatt's Admr.*, 29 Ky. L. Rep. 437, 93 S. W. 601; *Southern Lumber Co. v. Wireman*, 19 Ky. L. Rep. 585, 41 S. W. 297.

⁹ *Chicago, R. I. & P. R. Co.*, 29 Okla. 797, 119 Pac. 1008.

¹⁰ See *Goodman v. Robb*, 41 Hun (N. Y.) 605.

As to common-law rule, see authorities in footnote 1, this section.

¹¹ *Cincinnati, N. O. & T. P. R. Co. v. Third Nat. Bank*, 1 Ohio Cir. Ct. Rep. 199, reversing 8 Ohio Dec. 788, 9 Week. L. Bull. 355.

¹² *Ilfeld v. Zeigler*, 40 Colo. 401,

407, 91 Pac. 825, 827; *Wies v. Fanning*, 9 How. Pr (N. Y.) 543.

¹³ *Dovan v. Dinsmore*, 33 Barb. (N. Y.) 86.

¹⁴ *Branham v. Besanson*, 33 Minn. 49, 21 N. W. 861; *Nunne-macker v. Johnson*, 38 Minn. 390, 38 N. W. 351; *McKasy v. Huber*, 65 Minn. 9, 67 N. W. 650; *Ketcham v. Zerega*, 1 E. D. Smith (N. Y.) 561.

Infancy set up as a defense by a hypothetical plea that if an alleged contract of partnership was signed, the defendant was at the time a minor and not competent to execute such contract. — See *McKasy v. Huber*, 65 Minn. 9, 67 N. W. 650.

was indebted to the firm, and may set off such counter-indebtedness against the plaintiff's demand.¹⁵

§ 738. ERASURES AND INTERLINEATIONS. In these times of typewriting machines and cheap operators thereof, there is no excuse for illegible, slovenly, erased and interlined pleadings, and other court papers, which are scarcely decipherable; and the reason for the statutes and court rules regarding legibility, erasures and interlineations should be obsolete in practice. Where a pleading or other court paper requires to be changed, it should be re-run off on the typewriting machine before being presented or filed. The parties to an action, and the court, are entitled to pleadings and other court papers which are plain and readily readable, and not erased, interlined, or blotted to any extent.¹ However, the fact that a pleading or other court paper,—e. g., an affidavit of merits, to make it conform to the statutory requirements, and the like,—is interlined before it is sworn to, does not render it insufficient, or furnish ground for striking it from the files.²

§ 739. FALSITY IN PLEADING—SHAM ANSWERS. Falsity in a pleading is a vice that usually inheres in pleas of traverse or answers, yet is sometimes found in the pleading of the plaintiff, and where so found, if the pleading otherwise states facts sufficient to confer jurisdiction upon the court, the false matter contained in the pleading will not prevent the jurisdiction from attaching;¹ but where the false matter consists of an amended complaint which is known to be false, it will be void, under a rule of court making any attorney guilty of a contempt of court who makes statements in pleadings, known to be false, for the sake of delay.²

¹⁵ *Urquhart v. Powell*, 54 Ga. 29.

¹ See *Napper v. Short*, 17 Ill. 119.

² *Garrity v. Wilcox*, 83 Ill. 159.

¹ *Lynch v. Kirby*, 36 Mich. 238.

² *Boyd v. Belville*, 91 Tex. 439, 44 S. W. 287.

Falsity of an answer setting up new matter by way of a defense, being clear and indisputable, it is a sham and deceitful answer,³ provided the defendant knew that the matters thus set up were false⁴—although other cases hold that the defendant's ignorance of the falsity is immaterial,⁵—does not comply with the rule requiring a party to plead issuably,⁶ and will be stricken out on motion.⁷ The test of a sham answer is that it is untrue in fact,⁸ but the falsity can not be shown by comparisons with another plea or defense in the same answer;⁹ and when there is nothing upon the face of the pleading which shows that the facts set up in defense are false, but, on the other hand, they appear to be reasonable, the plea can not be said to be false on the face of the pleading, deceitful and a sham answer.¹⁰ Thus, where the complaint was to recover money alleged to have been paid to the defendant on account of a subscription to stock, that plaintiff notified defendant that he refused to take the stock, and that thereupon the defendant sold the stock to third parties, thereby abandoning the subscription the plaintiff had made; an answer alleging that the payment was not made on account of the par value of the stock, but was made under an agreement to pay such amount to be used in paying the running expenses of the

³ *Morton v. Johnson*, 2 Minn. 219; *Struver v. Ocean Ins. Co.*, 2 Hilt. (N. Y.) 475, 9 Abb. Pr. 23; *Benedict v. Tanner*, 10 How. Pr. (N. Y.) 455; *Littlejohn v. Greely*, 22 How. Pr. (N. Y.) 345, 13 Abb. Pr. 311; *Roome v. Nicholson*, 31 N. Y. Super. Ct. Rep. (1 Sweeny) 525, 8 Abb. Pr. N. S. 343; *Bachman v. Everding*, 1 Sawy. 70, Fed. Cas. No. 708; *Witherele v. Weber*, 4 Sawy. 232, Fed. Cas. No. 17917.

A sham answer is one setting up a new matter, the falsity of which is clear and indisputable.—*Morton v. Johnson*, 2 Minn. 219.

⁴ *Benedict v. Tanner*, 10 How. Pr. (N. Y.) 455.

⁵ *Roome v. Nicholson*, 31 N. Y. Super. Ct. Rep. (1 Sweeny) 525, 8 Abb. Pr. N. S. 343.

⁶ *Coffee v. Lawrence*, 2 Den. (N. Y.) 195.

⁷ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 453.

⁸ *Roome v. Nicholson*, 31 N. Y. Super. Ct. Rep. (1 Sweeny) 525, 8 Abb. Pr. N. S. 343.

⁹ *Bachman v. Everding*, 1 Sawy. 70, Fed. Cas. No. 708.

¹⁰ *Gray v. Gidder*, 4 Strab. L. (S. C.) 438.

company and the business, and that the payment was received for that purpose and so used, is not a sham answer, raising as it does a distinct issue between the parties as to the purpose for which the money was paid and the payment received.¹¹

§ 740. IMPERTINENCE AND SCANDAL. The terms “impertinence” and “scandal” are descriptive of a vice in pleading in equity, and the rules applicable to and governing are as applicable under the reformed procedural codes (except as to details pursued in accomplishing results) as under the common-law system of judicature. The former bill in equity, like the complaint under the procedural codes, was required to confine its statements to such facts as were pertinent to show that the plaintiff was entitled to relief, and which, if proved, would entitle him to the relief prayed for.¹ All matters of allegation or statement not material to the suit, or, if material, not in issue under the pleadings, were regarded as impertinences.² In the United States courts, every bill in equity is required to be expressed in as brief and succinct terms as is reasonably possible, and to contain no unnecessary matter,—e. g. recitals of deeds and documents, contracts and other written instruments set out in *hæc verba*; or any other impertinent or scandalous matter not relevant to the suit. If any such matter is inserted it will be stricken out according to the rules regulating equity pleading, by reference to and a finding by a master, at the expense of the pleader.³ Like rules exist in those states where the old equity system of practice still prevails.

In California, and in other states having reformed procedural codes, impertinent and scandalous matter, not connected with and not necessary to a determination of

¹¹ *MacCall v. American Union Life Ins. Co.*, 89 Hun (N. Y.) 490, 35 N. Y. Supp. 364. Stewart, 19 N. J. Eq. (4 C. E. Gr.) 343.

¹ *Camden & Amboy R. Co. v.*

² *Id.*

³ *Equity Rule 26.*

the issues raised, is treated as irrelevant and redundant matter, and stricken out on motion.⁴ It is to be noted that, both under the old equity practice and the reformed judicature, neither impertinence nor scandal, however gross it may be, is a ground for a demurrer; under both systems of pleading and procedure the maxim *utile per inutile non vitiatur*—the useful is not vitiated by the useless—applies,⁵ and controls as to these vices, alike, in complaints or bills and in answers.⁶

Impertinence exists where the records of the court are encumbered with long recitals, or with long digressions of matters of fact, which are altogether unnecessary and totally immaterial to the matters in question,—e. g. where a deed or other writing described and properly pleaded according to its legal effect,⁷ is unnecessarily set out in *hæc verba*;⁸ in other words, as the Alabama court has aptly put it, impertinence is matter included which can have no influence in leading to a result.⁹ The proper test

⁴ Kerr's Cyc. Cal. Code Civ. Proc., § 453. See *Goodrich v. Parker*, 1 Minn. 195.

As to irrelevant and redundant matter, see, post, § 741.

⁵ Daniel's Chancery Practice (5th ed.), ch. VI, § 4, p. 349; Story Eq. Pl. (9th ed.), § 269.

⁶ 1 Beach's Modern Eq. Pr. § 407.

⁷ As to pleading according to legal effect, see, ante, § 716.

⁸ ALA.—*Bromberg v. Bates*, 98 Ala. 621, 13 So. 557. MINN.—*Goodrich v. Parker*, 1 Minn. 195. N. J.—*Hutchinson v. Van Voorhis*, 54 N. J. Eq. 439, 35 Atl. 371. N. Y.—*Woods v. Morrell*, 1 Johns. Ch. 103, 106; *Hood v. Inman*, 4 Johns. Ch. 437; *Van Rensselaer v. Brice*, 4 Pal. Ch. 174. FED.—*Harrison v. Perea*, 168 U. S. 318, 42 L. Ed. 478, 18 Sup. Ct. Rep. 129; *Wood*

v. Mann, 1 Sumn. 578 Fed. Cas. No. 17952; *Kelley v. Boettcher*, 29 C. C. A. 14, 85 Fed. 55; *Wilmington & W. R. Co. v. Board of Railroad Commrs.*, 90 Fed. 33; *Stokes v. Farnsworth*, 99 Fed. 836, 838.

Issuable facts are to be stated, but there may also be properly stated any matter of evidence, or other collateral fact, the admission of which by the adversary may be material in establishing the general allegation.—*Goodrich v. Parker*, 1 Minn. 195.

⁹ *Bromberg v. Bates*, 98 Ala. 621, 13 So. 557.

Allegation of making of contract between the defendants, being wholly unconnected with the allegations in the complaint, is impertinent surplusage.—*Coe v. Kutinsky, Adler & Co.*, 82 Conn. 685, 74 Atl. 1065.

by which to determine whether matter alleged to be impertinent, is so in fact, is to try whether the subject-matter of the challenged allegation can be put in issue and would be material and proper to be given in evidence on the trial.¹⁰ Thus, to a complaint or bill in equity to enjoin a nuisance, a statement in an answer will be impertinent which details the organization of the defendant corporation and various historical matters not pertinent or responsive to the plaintiff's pleading;¹¹ or an allegation that the plaintiff's house was erected after the laying of the railroad tracks;¹² or where the pleading contains formal clauses which the statute, or a rule of court, requires to be omitted.¹³ But it is not impertinence for an executor, called to account, to state that property is held from him by a forged deed possessed by the plaintiff;¹⁴ or that the plaintiff is an alien, where the question of alienage is set up as a ground why other parties are not entitled under a will;¹⁵ or for a second mortgagee, in a suit to foreclose a prior mortgage, to state that his mortgage is for a greater amount than that stated in the complaint or bill, and for which he claims credit,¹⁶—and the like.

Scandal, or scandalous matter, in a pleading, is any unnecessary allegation or statement which is criminatory or bears cruelly upon the moral character of an indi-

¹⁰ *Wilkinson v. Dodd*, 42 N. J. Eq. (15 Stew.) 234, 7 Atl. 327; *Woods v. Morrell*, 1 Johns. Ch. (N. Y.) 103, 106; *Harrison v. Perea*, 168 U. S. 311, 42 L. Ed. 178, 18 Sup. Ct. Rep. 129; *Wilmington & W. R. Co. v. Board of Railroad Commrs.*, 90 Fed. 33.

Matter material to establish the rights of the parties or to ascertain the relief to be granted, is not to be deemed impertinent.—*Manhattan Trust Co. v. Chicago Electric Traction Co.*, 188 Fed. 1006.

¹¹ *Crammer v. Atlantic City Gas & Water Co.*, 39 N. J. Eq. 76.

¹² *Jones v. Roberts*, 4 Edw. Ch. (N. Y.) 611.

¹³ *Crammer v. Atlantic City Gas & Water Co.*, 39 N. J. Eq. 76; *Fairchild v. Fairchild*, 43 N. J. Eq. 473, 11 Atl. 426.

¹⁴ Silence on this point might prejudice the executor later.—*Jolly v. Carter*, 2 Edw. Ch. (N. Y.) 209.

¹⁵ *Jolly v. Carter*, 2 Edw. Ch. 209.

¹⁶ *Squires v. Shaw*, 24 N. J. Eq. (9 C. E. Gr.) 74.

vidual, being reproachful and scandalous, or that states anything which is contrary to good manners, or anything which is unbecoming to the dignity of the court to read or hear.¹⁷ To be scandalous the statement or allegation must also be impertinent,¹⁸ for where the matter pleaded is pertinent to the issue, however scandalous and tending to degrade, although it may be false, it can not be scandalous.¹⁹ Thus, in an action against an executor charging fraudulent appropriation of property by his decedent, an answer alleging that the charge was "a foul aspersion" and "hatched up" for the plaintiff's purposes, was held not to be scandalous;²⁰ and in an action or suit to renew a partnership, an answer alleging that defendant had become convinced that a business connection with the plaintiff "was inexpedient and unsafe," can not be deemed scandalous,²¹—and the like.

§ 741. IRRELEVANCY AND REDUNDANCY. These, also, are vices in pleading akin to impertinence and scandal,¹ which are to be scrupulously avoided. It has been said, that irrelevant, redundant, and evidentiary matters in a complaint is a much more serious violation of the principles of good pleading than in an answer.² The procedural codes, and statutes providing for avoidance of

¹⁷ *Hutchinson v. Van Voorhis*, 54 N. J. Eq. 349, 35 Atl. 371; *Woods v. Morrell*, 1 Johns. Ch. (N. Y.) 103, 106; *Raulston v. Ralston*, 13 Phila. (Pa.) 175; *Kelley v. Boettcher*, 29 C. C. A. 14, 85 Fed. 55; *Burden v. Burden*, 124 Fed. 250, 255; *Manhattan Trust Co. v. Chicago Electric Traction Co.*, 188 Fed. 1006.

Charging defendant with perjury, and by his evil influence on judge and jury, procuring a verdict against the plaintiff, and entering judgment thereon, is scandalous, and properly stricken

out.—*Ropers v. Stewart*, 54 Fla. 185, 45 So. 31.

¹⁸ *Goodrich v. Parker*, 1 Minn. 195; *Manhattan Trust Co. v. Chicago Electric Traction Co.*, 188 Fed. 1006.

¹⁹ *Powell v. Cobb*, 56 N. C. 1; *Wilmington & W. R. Co. v. Board of Railroad Commrs.*, 90 Fed. 33.

²⁰ *Gleaves v. Morrow*, 2 Tenn. Ch. 592.

²¹ *Griswold v. Hill*, 1 Paine 390, Fed. Cas. No. 5835.

¹ See, ante, § 740.

² *Gutta Percha & Rubber Mfg. Co. v. Holman*, 150 App. Div. (N. Y.) 678, 135 N. Y. Supp. 766.

prolixity and unnecessary verbiage in pleading, do not relieve the pleader of the necessity of setting out the essential ultimate facts of his cause of action or of defense;³ but the fact that such ultimate facts are stated with more detail than is necessary under such statutes, does not render the pleading irrelevant and redundant,⁴ or necessarily in any other manner defective;⁵ and setting out a state of facts which tends to and might, under proper averment, constitute a good cause of action or defense, but which, in the manner pleaded, does not do so, does not render the pleading irrelevant and redundant.⁶ In other words, bad pleading is not necessarily irrelevant and redundant.⁷ Any matters tending to show a good cause of action or defense, or pertinent and germane to the proper determination of the controversy, are properly pleaded in due form. Thus, in a complaint to recover under a special contract for services, united to a claim for the reasonable value of such services, an allegation as to the reasonable value of such services, is neither irrelevant nor redundant.⁸ Greater latitude in pleading is allowed in equity than at law, but this rule does not permit irrelevant and redundant matters to remain in a pleading in equity.⁹

³ See *Miller v. Ambrose*, 35 App. D. C. 75.

⁴ *Valley Lumber Co. v. McGilvery*, 16 Idaho 338, 101 Pac. 94. See *Kansas City So. R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83.

⁵ Unnecessary matter and redundancy, do not necessarily render a pleading defective.—*Kansas City So. R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83.

⁶ *Ellison v. Branstrattor*, 45 Ind. App. 307, 88 N. E. 963, 89 N. E. 915.

⁷ Fraud and misrepresentation set up as a defense, in one action

on a contract, failing to allege that upon discovery of the fraud defendant rescinded the contract, or returned, or offered to return, any benefits he had received thereunder, is not irrelevant and frivolous; is capable by proper allegation, of being made a good defense, but in that form is subject to demurrer.—*Merchants' Review Pub. Co. v. Buchan's Soap Co.*, 107 N. Y. Supp. 726.

⁸ *Metcalf Co., E. D., v. Gilbert*, 19 Wyo. 331, 116 Pac. 1017.

⁹ *Isaacs v. Salomon*, 159 App. Div. (N. Y.) 675, 144 N. Y. Supp.

In California,¹⁰ New York,¹¹ South Carolina,¹² Wisconsin,¹³ and elsewhere, the proper method of objection to irrelevant and redundant matter in a pleading, is by motion to strike out, not by demurrer.¹⁴

Irrelevancy, or irrelevant, as used in respect to a pleading has been said to be equivalent to "frivolous";¹⁵ to signify "impertinent"¹⁶ or inapplicable matter,¹⁷ or "irrelative" matter.¹⁸ "Irrelevancy" in an allegation, therefore, is one that does not have any substantial relation to or affect the matter in controversy between the parties in the action or suit.¹⁹ The denial of a matter

876; *Steinman v. Salomon*, 159 App. Div. (N. Y.) 678, 144 N. Y. Supp. 879.

¹⁰ See *Kerr's Cyc. Cal. Code Civ. Proc.*, § 453.

¹¹ *Fasnacht v. Stehn*, 53 Barb. (N. Y.) 650; *Carpenter v. West*, 5 How. Pr. (N. Y.) 53; *Nichols v. Jones*, 6 How. Pr. (N. Y.) 355, 358.

¹² *Smith v. Smith*, 50 S. C. 54, 67, 23 S. E. 545; *Bank of Timmons ville v. Fidelity & Casualty Co.*, 121 Fed. 934, 935.

¹³ *Carpenter v. Reynolds*, 59 Wis. 666, 17 N. W. 300.

¹⁴ See footnote 39, this section.

¹⁵ *Colt v. Davis*, 50 Hun (N. Y.) 366, 3 N. Y. Supp. 354.

¹⁶ As to impertinence, see, ante, § 740.

¹⁷ *Scofield v. State Nat. Bank*, 9 Neb. 316, 31 Am. Rep. 412, 2 N. W. 888; *People v. McCumber*, 18 N. Y. 315, 72 Am. Dec. 515; *Fasnacht v. Stehn*, 53 Barb. (N. Y.) 650, 651; *Carpenter v. West*, 5 How. Pr. (N. Y.) 53, 55.

¹⁸ *Steward v. Miller*, 6 How. Pr. (N. Y.) 312, 314.

¹⁹ FLA.—*Hildreth v. Western*

Union Tel. Co., 56 Fla. 387, 47 So. 820. IND.—*Ellison v. Branstrattor*, 45 Ind. App. 307, 88 N. E. 963, 89 N. E. 915. MINN.—*Morton v. Jackson*, 2 Minn. 219. NEB.—*Scofield v. State Nat. Bank*, 9 Neb. 316, 31 Am. Rep. 412, 2 N. W. 888. N. Y.—*Kolb v. Mortimer*, 135 App. Dec. 542, 120 N. Y. Supp. 543; *Struver v. Ocean Ins. Co.*, 2 Hilt. 475; *Jebrass v. McKillop & Sprague Co.*, 2 Hun 351, 353; *Goodman v. Robb*, 41 Hun 605; *Walker v. Hewitt*, 11 How. Pr. 395, 398; *Fobricotti v. Launitz*, 5 N. Y. Super. Ct. Rep. (3 Sandf.) 472; *Carpenter v. Bell*, 24 N. Y. Super. Ct. Rep. (1 Rob.) 711, 715. N. C.—*Howell v. Ferguson*, 87 N. C. 113. S. C.—*Smith v. Smith*, 50 S. C. 54, 67, 27 S. E. 545; *Dent v. South Bound R. Co.*, 61 S. C. 329, 39 S. E. 527. WYO.—*Metcalf Co., E. D., v. Gilbert*, 19 Wyo. 331, 116 Pac. 1017. FED.—*Bank of Timmons ville v. Fidelity & Casualty Co.*, 121 Fed. 934.

Attempting to set off debt arising out of a contract in an action for an assault and battery.—*Walker v. Hewitt*, 11 How. Pr. (N. Y.) 395, 398.

can not be irrelevant.²⁰ The true test of relevancy of an allegation challenged, is whether it tends to show a cause of action or defense.²¹

—*Illustrations* of the rule may be noted as follows: In an action for a libel based on a letter sent by one stockholder to another in which he charged misappropriation of the assets of the corporation, an answer that the defendant was an attorney, and that he was representing, as attorney, another person who had brought an action against the plaintiff, is wholly irrelevant.²² In an action on a note given for the purchase-price of a fertilizer containing a provision that the payee should not be responsible for the action of the fertilizer on crops, a defense that the defendant bought the fertilizer on the representation of the plaintiff that it was good for a cotton crop, and that the fertilizer ruined his crop, is irrelevant.²³ Complaint to recover a balance for goods sold and delivered which, in addition, alleges the performance on the part of the plaintiff of an arbitration agreement, an answer alleging that, though the arbitration agreement was valid, the plaintiff had failed to comply therewith, and that the arbitration agreement had failed through no fault of the defendant, was held to be irregular and redundant.²⁴ To a complaint seeking to recover a balance claimed to be due on certain shares of stock, an answer alleging that the transfer-tax had not been paid on the sale and purchase of the stock, is not irrelevant under a statute making it a misdemeanor not to pay the transfer-tax on such a sale at the time the transfer is made, and also providing that the transaction in such

²⁰ Morton v. Jackson, 2 Minn. 219.

²¹ Kolb v. Mortimer, 135 App. Div. (N. Y.) 542, 120 N. Y. Supp. 543.

²² Winsor v. Ottofy, 140 Mo. App. 563, 120 S. W. 693.

²³ Germofert Mfg. Co. v. Castles,

97 S. C. 389, 81 S. E. 665; Germofert Mfg. Co. v. Delleney, 97 S. C. 395, 81 S. E. 667; Germofert Mfg. Co. v. Scruggs, 97 S. C. 396, 81 S. E. 667.

²⁴ Barry v. Silberstein, 164 App. Div. (N. Y.) 220, 149 N. Y. Supp. 627.

stock may not be made the basis of an action at law when the transfer-tax was not paid at the time of the transfer.²⁵

Redundancy, as used in regard to a pleading, is equivalent to "verbosity" in many instances, and has been variously defined as: An excessive statement or a repetition;²⁶ an introduction of matter foreign to, or not necessary to, the cause of action or defense stated;²⁷ matter impertinently or unnecessarily stated in setting out a cause of action or defense;²⁸ matter which is irrelevant;²⁹ needless repetition of material averments;³⁰ needless repetition of immaterial facts;³¹ superfluous matter, more than is necessary, superabundance.³² A conclusion of law,³³ or the legal conclusion of the pleader,³⁴ is redundancy. A count not varying substantially from a preceding count, is redundant.³⁵ Prolixity may become redundancy.³⁶ A complaint in which the plaintiff seeks to sue for himself and others, but does not allege facts necessary to entitle such others to participate in the action, is redundant in so far as all allegations respecting such other persons is concerned;³⁷ and in a complaint

²⁵ *Sheridan v. Tucker*, 133 App. Div. (N. Y.) 436, 122 N. Y. Supp. 800.

²⁶ *Metcalf Co., E. D., v. Gilbert*, 19 Wyo. 331, 116 Pac. 1017.

²⁷ *Carpenter v. Reynolds*, 58 Wis. 666, 17 N. W. 300.

²⁸ *Fasnacht v. Stehn*, 5 Abb. Pr. N. S. (N. Y.) 338, 343, 53 Barb. 650.

²⁹ *Bowman v. Sheldon*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 657, 660.

"Converse by no means true."—*Bowman v. Sheldon*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 657, 660.

³⁰ *Carpenter v. Reynolds*, 58 Wis. 666, 17 N. W. 300. See *Metcalf Co., E. D., v. Gilbert*, 19 Wyo. 331, 116 Pac. 1017.

³¹ *Bowman v. Sheldon*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 657, 660.

"Although the facts averred, so far from being irrelevant, constitute the whole cause of action" or defense.—*Bowman v. Sheldon*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 657, 660.

³² *Carpenter v. West*, 5 How. Pr. (N. Y.) 53, 55.

³³ *Carpenter v. Reynolds*, 58 Wis. 666, 17 N. W. 300.

³⁴ *Kolb v. Mortimer*, 135 App. Dec. (N. Y.) 542, 120 N. Y. Supp. 543.

³⁵ *Sowter v. Seekonk Lace Co.*, 34 R. I. 304, 83 Atl. 437.

³⁶ *Carpenter v. West*, 5 How. Pr. (N. Y.) 53, 55.

³⁷ *Corey v. Brown*, 58 Cal. 180, 182; *Baines v. West Coast Lumber Co.*, 104 Cal. 1, 7, 37 Pac. 767.

charging failure of representations that cars hired for construction work could handle all kinds of rock excavation in the shortest possible time and at the least cost, an allegation that the cars were unfit for rock construction work is redundant.³⁸ A complaint is not demurrable for redundant allegations;³⁹ and redundancy does not authorize that an entire pleading be stricken out for that vice;⁴⁰ simply the redundant matter should be stricken out.

§ 742. LANGUAGE USED—ABBREVIATIONS, BAD GRAMMAR, CLERICAL ERRORS, ETC. All pleadings under the procedural codes,—and in other jurisdictions not having the reformed procedure, for that matter,—are required to be in the English tongue,¹ and to state the ultimate facts relied upon as a cause of action or as a defense in ordi-

³⁸ *O'Rurke Engineering & Constr. Co. v. Goodwin Cor. Co.*, 144 App. Div. (N. Y.) 583, 129 N. Y. Supp. 144.

³⁹ *Carey v. Brown*, 58 Cal. 180.

⁴⁰ *Fasnacht v. Stehn*, 5 Abb. Pr. N. S. (N. Y.) 338, 343, 53 Barb. 650.

¹ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 185. See *Dunton v. Montoyo*, 1 Colo. 99; *Trinidad, Town of, v. Simpson*, 5 Colo. 65, 69; *Fleming v. Conrad*, 11 Mont. (O. S.) 301; *Generes v. Simon*, 21 La. Ann. 653; *Goodall v. Harrison*, 2 Mo. 153; *Smith v. Butler*, 25 N. H. 521.

"Actio non," used for the words "the plaintiff his action ought not to maintain," will not be rejected because they are Latin, but because they are insensible.—*Berry v. Osborn*, 28 N. H. 279.

Arabic numerals, for some purposes, are a part of the English language.—*Clark v. Stoughton*, 18 Vt. 50, 44 Am. Dec. 361.

"Etc." for the Latin etcetera, equivalent to "and so forth," is English.—*Berry v. Osborn*, 28 N. H. 279.

Quotation in French of note or of description in mortgage written in that language, is irregular on that account.—*Generes v. Simon*, 21 La. Ann. 653; *Meigs v. Guiraud*, 3 Ohio Dec. 328.

As to method of pleading document in foreign language, see, ante, § 722.

"\$" is not an abbreviation, and its use in a prayer for a judgment for damages in the sum of \$10,000 is bad because of the use of \$, under a statute requiring the pleadings to be in the English language.—*Goodall v. Harrison*, 2 Mo. 153.

The contention that § attached to figures is not in the English language, is frivolous.—*Weed v. Hunt*, 76 Vt. 212, 56 Atl. 980. See *Fulenwider v. Fulenwider*, 53 Mo. 439.

nary **and concise language**,²—the obsolete technical terms of the **old common-law** system of pleading should not be used,³—**without** detailed history of the cause or details of evidence.⁴ A plain statement of the ultimate facts in plain **and simple language** is all that is required;⁵ and if the facts are thus alleged, if proved on the trial, are such as to entitle the party to relief under any of the recognized forms of action at common law, they are sufficient as a basis for relief, whatever it may be.⁶ The only essential requisite of good code pleading is that it shall state a cause of action, or of defense, so clearly and distinctly that it may readily be understood by the adverse party, by counsel, by the jury and by the trial judge.⁷

Abbreviations, or initial letters of words, numerals and symbols, used in pleadings, which, when taken in connection with the remainder of the pleading and the subject-matter of the action at law or suit in equity, are not ambiguous,⁸ and can be clearly understood, the same effect will be given to them as though written out in full.⁹ Among the abbreviations, and the like, which have been held by courts of last resort to be sufficient in pleading, without attempting to be exhaustive, may be instanced the following: “Etc.” for the Latin *et cetera*, is a permissible abbreviation, even under statutes requiring

² *Smith v. Matthews*, 81 Cal. 120, 22 Pac. 409; *Rogers v. Duhart*, 97 Cal. 500, 32 Pac. 570.

³ *Prewitt v. Clayton*, 21 Ky. (5 T. B. Mon.) 4; *Cohn v. Ottenheimer*, 13 Ore. 220, 10 Pac. 20.

⁴ *Smith v. Matthews*, 81 Cal. 120, 22 Pac. 409.

⁵ *Woodroof v. Howes*, 88 Cal. 184, 190, 26 Pac. 111; *Rogers v. Duhart*, 97 Cal. 500, 32 Pac. 570.

⁶ *Rogers v. Duhart*, 97 Cal. 500, 32 Pac. 570.

⁷ *Preston v. Central California*

Water & Irr. Co., 11 Cal. App. 190, 104 Pac. 462.

Of complaint is this especially true, that the defendant may be enabled to plead thereafter any judgment rendered in bar of another action for the same cause.—*Preston v. Central California Water & Irr. Co.*, 11 Cal. App. 190, 104 Pac. 462.

⁸ As to ambiguity, see, ante, § 731.

⁹ *Odd Fellows' Bldg. Assoc. v. Hogan*, 28 Ark. 261.

pleadings to be in the English language;¹⁰ “Feb.” or “Febr’y,” for February,¹¹ but “judg.” is not permissible for judgment;¹² “f. o. b. cars” at a designated place, does not render a pleading fatally defective for failure to allege the meaning of the abbreviation;¹³ “L. S.,” for “seal,” in the copy of a document;¹⁴ “one thous. dollars,” permissible abbreviation in prayer in a complaint;¹⁵ “S/87 wheat,” can not be said to be unintelligible or meaningless in a pleading,¹⁶ or to render the pleading ambiguous¹⁷ or uncertain,¹⁸ and vulnerable to a special demurrer;¹⁹ “v.” or “vs.,” for the Latin versus, in the title of a cause, by long usage, has become so ingrafted in the English language as to be unobjectionable under a statute requiring all pleadings to be in the English language;²⁰ “88,” used in a complaint in describing the time of the commission of a tort, will be read with the proper prefix of the century;²¹ “\$” has been said not to be an abbreviation, and not to be good under a statute requiring pleadings to be in the English language,²² although the contrary has been held, and is the better doctrine, supported by the weight of authority,²³ it being specifically held to be sufficient in a complaint, or a prayer thereto, to use Arabic figures preceded by the dollar sign (\$) to indicate the amount of the demand²⁴—though

¹⁰ See footnote 1, this section.

¹¹ *Cutting v. Conkling*, 28 Ill. 506.

¹² *Cassidy v. Holbrook*, 81 Me. 589, 18 Atl. 290.

¹³ *Vivion Mfg. Co., D. R., v. Robertson*, 176 Mo. 219, 75 S. W. 644.

¹⁴ *Smith v. Butler*, 25 N. H. 521.

¹⁵ *Rice v. Buchanan*, 1 Ohio Dec. 56.

¹⁶ *Berry v. Kowalsky*, 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202.

¹⁷ As to ambiguity, see, ante, § 731.

¹⁸ As to certainty, directness and particularity, see, ante, § 733.

¹⁹ *Berry v. Kowalsky*, 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202.

²⁰ *Smith v. Butler*, 25 N. H. 521.

²¹ *Medsker v. Pogue*, 1 Ind. App. 197, 27 N. E. 432.

²² *Goodall v. Harrison*, 2 Mo. 153.

²³ See, ante, footnote 1, this section.

²⁴ *Fulenwider v. Fulenwider*, 53 Mo. 439.

it is much better pleading to spell the amount out at length.

Bad grammar in a pleading will not render it fatally defective, where the meaning is clear,²⁵ and the pleading is otherwise sufficient. Thus, a grammatical inaccuracy in a complaint, the obvious sense of which is to charge negligence on the part of the defendant, will not make the pleading void;²⁶ and the same is true of a pleading in the participial form instead of being formed in the indicative mood;²⁷ or the use of a personal pronoun grammatically referring to the defendant, but manifestly intended to refer to the plaintiff.²⁸

Clerical errors and mistakes and omissions in writing and spelling, where they can be corrected by papers made part of the pleading by reference,²⁹ will not render the pleading defective,³⁰ and will be disregarded where the error and the correction are manifest from the face of the pleading. Thus, it has been held harmless, where the context corrects the error, to insert 1893 for 1894,³¹ or 1901 for 1891;³² misspelling a word, where the meaning is plain, is harmless,—as a pleading alleging that “no part of a check was pain, except” a designated amount;³³ “of” needlessly inserted in a description of lands leased, so as to show, by the exact language, an ownership in fee in the lessor instead of a leasing, the “of” will be disregarded where the context shows that the purpose of the pleader was to describe a leasing;³⁴ likewise the omission of a word will not vitiate the pleading, where the

²⁵ *Hovey v. Brown*, 59 N. H. 114.

²⁶ *Parsons v. Mayfield*, 73 Mo. App. 309.

²⁷ *Gundershelmer v. Earnshaw*, 13 App. D. C. 178.

²⁸ *Moore v. Beem*, 83 Ind. 219.

²⁹ See, ante, § 730.

³⁰ *Briggs v. Mason*, 31 Vt. 433.

³¹ *State ex rel. Fisher v. Rodicker*, 145 Mo. 450, 46 S. W. 1083.

³² *State v. Quantic*, 37 Mont. 32, 94 Pac. 491.

³³ *Conner v. Becker*, 62 Neb. 856, 87 N. W. 1065.

³⁴ *Crossen v. Granedy*, 42 Ore. 282, 70 Pac. 906.

meaning is clear and the word can readily be supplied;³⁵ using a wrong word is immaterial, as “defendant left him surviving” instead of “decedent,”³⁶ or “proper” for “improper” in a personal injury cause in charging defendant with negligence in furnishing medical attention;³⁷ or the use of one word for another where the meaning is clear,³⁸—as defendant for defendants,³⁹ defendant for plaintiff,⁴⁰ or plaintiff for defendant.⁴¹ In action by a personal representative to recover for injuries causing death, an allegation that the wagon “ran into plaintiff” instead of “plaintiff’s intestate,” is a mere clerical error which can be corrected at any time;⁴² and error in an allegation in a reply in an action by a contractor to foreclose an assessment-lien, in stating that plaintiff did not make the contract for the improvement, is corrected by a subsequent allegation that he completed the improvement on a designated date according to his said contract.⁴³

³⁵ *Trapnall v. Merrick*, 21 Ark. 503.

³⁶ *Kennedy v. New York & H. River R. Co.*, 49 Hun (N. Y.) 535, 15 N. Y. Civ. Proc. Rep. 347, 2 N. Y. Supp. 512.

³⁷ *Haggarty v. St. Louis, K. & N. W. R. Co.*, 100 Mo. App. 424, 74 S. W. 456.

³⁸ *Indiana, B. & W. R. Co. v. Dalley*, 110 Ind. 75, 10 N. E. 631; *Ross v. Banta*, 140 Ind. 120, 34 N. E. 865; *Praigg v. Western Paving & Supply Co.*, 143 Ind. 358, 42 N. E. 750.

“East” instead of “West.”—*Praigg v. Western Paving & Supply Co.*, 143 Ind. 358, 42 N. E. 750.

“Property” by clerical error inserted instead of “plaintiff,” in an action to recover possession of bond.—*Ross v. Banta*, 140 Ind. 120, 34 N. E. 865.

³⁹ *Cutter v. Conklin*, 28 Ill.

506; *Chamberlin v. Kaylor*, 2 E. D. Smith (N. Y.) 134; *German Exchange Bank v. New Jersey & S. D. Brewing Co.*, 13 Misc. (N. Y.) 192, 34 N. Y. Supp. 133.

⁴⁰ *Kentucky Cent. R. Co. v. Carr*, 19 Ky. L. Rep. 1172, 43 S. W. 193; *Johnston v. Missouri Pac. R. Co.*, 96 Mo. 340, 9 Am. St. Rep. 351, 9 S. W. 790; *Hall & Brown Wood-Working Mach. Co. v. Brown*, 82 Tex. 469, 17 S. W. 715.

⁴¹ *Monmouth Min. & Mfg. Co. v. Erling*, 148 Ill. 521, 39 Am. St. Rep. 187, 36 N. E. 117; *Avent-Bettyville Coal Co. v. King Powder Co.*, 19 Ky. L. Rep. 920, 41 S. W. 433; *Burstein v. Levy*, 49 Misc. 469, 98 N. Y. Supp. 853.

⁴² *King v. Mail & Express Co.*, 113 App. Div. (N. Y.) 90, 98 N. Y. Supp. 891. See *Evans v. Nealis*, 69 Ind. 148.

⁴³ *Willard v. Albertson*, 23 Ind. App. 162, 53 N. E. 1076.

Figures may be used to express dates and sums.⁴⁴

Scilicet and videlicit clauses, in every species of pleading, is used for the purpose of enabling the pleader to isolate, to distinguish, to explain, and to fix with certainty that which was before, and otherwise would remain, general, and which, without such isolation and explanation, might, with equal propriety, be applied to different objects;⁴⁵ or the clause may be used to indicate that the pleader will not undertake to prove the precise circumstance as alleged.⁴⁶ Where the clause contains that which is material and necessary to be alleged, it has the force of a direct and positive averment, is material and traversable.⁴⁷ The clause need not be used where it is not necessary to the proper statement of a cause of action or defense; thus, in a complaint for a personal injury occurring at a point beyond the boundary-line of the state, the place need not be laid under a *videlicet*, that is, it is not necessary to add: "to wit, at," designating the point.⁴⁸

Words and phrases used in pleading: We have already noted the fact that the words and phrases and technical terms used in pleading under the common-law system of judicature are not required under the reformed judicature,⁴⁹ and should not be used.⁵⁰ Among other and common words and phrases it is to be noted that the use of the word "charge" in a pleading in a civil action is

⁴⁴ *Hyde v. Moffat*, 16 Vt. 271.
See *Clark v. Stoughton*, 18 Vt. 50,
44 Am. Dec. 361.

See, also, footnotes 1, 21 and 24,
this section.

⁴⁵ *Hastings v. Lovering*, 19
Mass. (2 Pick.) 214, 13 Am. Dec.
420; *Com. v. Hart*, 76 Mass. (10
Gray) 465.

⁴⁶ *Chicago Terminal Transfer
Co. v. Young*, 118 Ill. App. 226.

⁴⁷ *Hastings v. Lovering*, 19
Mass. (2 Pick.) 214, 13 Am. Dec.
420.

Complaint on contract of war-
ranty of quality of oil as of "good
and superior quality, to wit, prime
quality winter oil," the words
under the *videlicet* clause were
held to be material and travers-
able.—*Hastings v. Lovering*, 19
Mass. (2 Pick.) 214, 13 Am. Dec.
240.

⁴⁸ *Smith v. Bull*, 17 Wend.
(N. Y.) 323.

⁴⁹ See, ante, §§ 21-30.

⁵⁰ See footnote 3, this section.

equivalent to and means “aver” or “state.”⁵¹ The words “duty,” “false,” “groundless,” “unlawful,” “wilful,” “wrongful,” tender no issue,⁵² and are merely superfluous words.⁵³ The word “neighborhood” is an indefinite term which should not be used in a pleading, as a “neighborhood” may consist of two or more houses upon a single farm,⁵⁴ and is to be construed most strongly against the pleader.⁵⁵

§ 743. MATERIAL ALLEGATION NOT CONTROVERTED—DEEMED TRUE. The California procedural code provides,—and like provisions are found in other jurisdictions,—that every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true; and that the statement of any new matter in the answer, either in avoidance or constituting a defense or counter-claim, must, on the trial, be deemed controverted by the opposite party.¹ A mate-

⁵¹ Official bond of city clerk sued on, charging a deficiency or defalcation, an answer by a defendant, surety on the bond, that he was “informed and charged” that the clerk had paid to the city a certain sum in excess of the amount that was claimed as a balance due, the word “charged” was held to be equivalent to the words “averred” or “stated.” — *Talliaferro v. Dayton, City of*, 10 Ky. L. Rep. 197.

⁵² *Going v. Dinwiddie*, 86 Cal. 633, 638, 25 Pac. 129.

See, ante, § 728, footnote 3, and text.

⁵³ See, ante, § 741.

⁵⁴ *Aliso Water Co. v. Baker*, 95 Cal. 268, 30 Pac. 537.

⁵⁵ *Id.* See, also, post, § 756.

¹ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 462.

Answer failing to traverse material issues of complaint there is

no question to be determined by the court or a jury.—See: CAL.—*Patterson v. Ely*, 19 Cal. 28, 34; *Brown v. Scott*, 25 Cal. 189, 197; *Landers v. Bolton*, 26 Cal. 393, 416; *Fish v. Redington*, 31 Cal. 185, 195; *Pomeroy v. Gregory*, 66 Cal. 572, 573, 6 Pac. 492; *Camp v. Lassen*, 67 Cal. 139, 140, 7 Pac. 430; *Hanson v. Fricker*, 79 Cal. 283, 21 Pac. 751; *Prentice v. Miller*, 82 Cal. 570, 573, 23 Pac. 189; *Ortega v. Cordero*, 88 Cal. 221, 227, 26 Pac. 80; *Merfuires v. O'Donnell*, 103 Cal. 50, 52, 36 Pac. 1033; *McGowan v. McDonald*, 111 Cal. 57, 72, 52 Am. St. Rep. 149, 159, 43 Pac. 418; *California Title Ins. & T. Co. v. Consolidated Piedmont Cable Co.*, 117 Cal. 237, 240, 49 Pac. 1. COLO.—*Wilson v. Hawthorne*, 14 Colo. 530, 20 Am. St. Rep. 290, 24 Pac. 548; *Teller v. Hartman*, 16 Colo. 447, 27 Pac. 947; *Amanda Gold Min. & Mill. Co. v. People's Min.*

rial allegation in a pleading is defined as one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.²

Answer to be sufficient must traverse all the material allegations in the complaint, and do so in a direct and positive manner sufficient to raise an issue. A denial on information and belief of ultimate facts stated in the complaint which are presumed to be within the knowledge of the defendant, is an evasive and insufficient answer, unless the defendant also explains satisfactorily why the facts are not within his knowledge.³ The denial, to be sufficient, must fully meet and traverse the material allegations of the complaint. Thus, a mere denial of the character of the possession in an action charging forcible entry and detention, by an averment that defendant did not "wrongfully and unlawfully enter and dispossess" plaintiff, is insufficient because it goes to the character of the possession, only, whereas it is required to deny the facts set out.⁴ A defective and imperfect denial is not sufficient, unless acted upon as sufficient⁵ by a failure to object thereto before the introduction of evidence.⁶ A general denial of the allegations in the complaint does not specifically deny the material allegations, and has been said not to be sufficient.⁷ A conjunctive denial of the complaint as a whole, has been said not to be sufficient.⁸

& Mill. Co., 28 Colo. 251, 64 Pac. 218; Putnam v. Lyon, 3 Colo. App. 144, 32 Pac. 492; Oil Creek Gold Min. Co. v. Fairbanks, Morse & Co., 19 Colo. App. 142, 74 Pac. 543. N. M.—Berry v. Hull, 6 N. M. 643, 30 Pac. 936.

² Kerr's Cyc. Cal. Code Civ. Proc., § 463.

³ Zany v. Rawhide Gold Min. Co., 15 Cal. App. 375, 114 Pac. 1026.

⁴ Burke v. Table Mountain Water Co., 12 Cal. 403, 408; Busenius v. Coffee, 14 Cal. 91, 93.

⁵ Loftus v. Fischer, 105 Cal. 616, 39 Pac. 1064.

⁶ Tynan v. Walker, 35 Cal. 634, 645, 95 Am. Dec. 152; Tevis v. Hicks, 41 Cal. 123, 128; Stockton Combined-Harvester & Agric. Works v. Glenns Falls Ins. Co., 121 Cal. 167, 171, 53 Pac. 565.

⁷ Dewey v. Bowman, 8 Cal. 145, 149; Hensley v. Tartar, 14 Cal. 508, 510.

⁸ Fish v. Redington, 31 Cal. 185, 195; Nolan v. Henting, 138 Cal. 281, 284, 71 Pac. 140.

A partial denial does not meet the requirements of the code, and is insufficient.⁹

Complaint in intervention which is, in effect, but an answer to the complaint in the action, and such new matter as is set up therein is merely in defense of the rights of the defendants, is not within the provision of the section of the code quoted above; and the fact that the pleading is denominated a complaint by the pleader does not require that its allegations must be traversed, or deemed to be taken as true under the code.¹⁰ It is not what the pleader names the pleading, but the averments that it contains, that determines its character; it will be treated as an answer, whatever it may be called by the pleader, where, from its contents, it is in fact an answer.¹¹

Cross-complaint stands upon the same footing, under the code, as the original complaint, and all its material allegations not denied must be deemed to be admitted,¹² provided the pleading is in fact a cross-complaint and not some other pleading in effect, and a cross-complaint in name only.¹³ But a failure to deny the material allegations of a cross-complaint does not deprive the plaintiff of the right to establish his cause of action, the cross-complaint not, ipso facto, extinguishing plaintiff's claim, simply leaving him to recover the difference between the two claims.¹⁴ This matter will be more fully discussed in a later chapter devoted to Cross-Complaints.¹⁵

Immaterial allegations in a complaint need not be denied, and are not admitted by a failure to traverse;¹⁶

⁹ *De Ro v. Cordis*, 4 Cal. 117, 120; *Mathewson v. Fitch*, 22 Cal. 86, 94; *Cunningham v. Norton*, 5 Cal. Unrep. 35, 40 Pac. 491; *McClelland v. Bullis*, 43 Colo. 69, 81 Pac. 771, 776.

¹⁰ *People ex rel. Fogg v. Perris Irr. Dist.*, 132 Cal. 289, 291, 64 Pac. 399, 773.

¹¹ See *Haight v. Tryon*, 5 Cal. Unrep. 761, 34 Pac. 712.

¹² *Herold v. Smith*, 34 Cal. 122, 125; *Murphy v. Murphy*, 141 Cal. 471, 474, 75 Pac. 60; *Winters v. McMillan*, 87 Cal. 256, 264, 23 Am. St. Rep. 243, 25 Pac. 407.

¹³ *Haight v. Tryon*, 5 Cal. Unrep. 761, 34 Pac. 712.

¹⁴ *Langford v. Langford*, 136 Cal. 507, 508, 69 Pac. 235.

¹⁵ See, post, § —

¹⁶ *Racouillat v. Rene*, 32 Cal.

but a denial of such allegations merely, admits essentials in a complaint, and entitles to a judgment.¹⁷ Thus, allegations in anticipation of a defense,¹⁸ or of a conclusion of law,¹⁹ or of matters of evidence²⁰ or of inducement,²¹ or of jurisdictional facts,²² are not admitted by a failure to deny.

Reply is not required, being a pleading unknown to the California system of procedure, under which the statute above quoted does for the plaintiff that which he might not be able to do by actual pleading,²³ providing, as it does, that all the affirmative matter in the answer

450, 455; *Jones v. Petaluma, City of*, 36 Cal. 230, 233; *Nunan v. San Francisco, City of*, 38 Cal. 689, 690; *Bay State Silver Min. Co. v. Brown*, 21 Fed. 167.

Gross allegation as to property destroyed, including good-will and advertising patronage, no recovery can be had in regard to good-will and advertising patronage, and the allegations regarding the same do not require a denial under the code-requirement. — *Nunan v. San Francisco, City of*, 38 Cal. 689, 690.

¹⁷ *Leffingwell v. Griffing*, 31 Cal. 231.

¹⁸ *Canfield v. Tobias*, 21 Cal. 349, 350.

¹⁹ *Kidwell v. Ketler*, 146 Cal. 12, 79 Pac. 514.

²⁰ *Racouillat v. Rene*, 32 Cal. 450, 456; *Jones v. Petaluma, City of*, 36 Cal. 230, 233.

²¹ *Fleishman v. Meyer*, 46 Ore. 267, 80 Pac. 209, 211.

²² *Bennett v. Bennett*, 28 Cal. 592, 601.

²³ *Herold v. Smith*, 34 Cal. 122; *Stringer v. Davis*, 35 Cal. 25, 29; *Jones v. Jones*, 38 Cal. 584, 585; *Curtiss v. Sprague*, 49 Cal. 301,

302; *Coulton Land & Water Co. v. Raynor*, 57 Cal. 585, 589; *Pfister v. Wade*, 69 Cal. 133, 137, 10 Pac. 369; *Magee v. North Pac. Coast R. Co.*, 78 Cal. 430, 435, 12 Am. St. Rep. 69, 21 Pac. 114; *Rankin v. Sisters of Mercy*, 82 Cal. 88, 95, 23 Pac. 1134; *Grange Business Assoc. v. Clark*, 84 Cal. 201, 204, 23 Pac. 1081; *Fox v. Tay*, 89 Cal. 339, 344, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897; *Williams v. Dennison*, 94 Cal. 540, 543, 29 Pac. 946; *Pierce v. Southern Pac. R. Co.*, 120 Cal. 156, 162, 47 Pac. 874; *London & San Francisco Bank v. Parrott*, 125 Cal. 472, 489, 73 Am. St. Rep. 64, 58 Pac. 164; *Pacific Investment Co. v. Ross*, 131 Cal. 8, 10, 63 Pac. 67; *Merced Bank v. Price*, 145 Cal. 436, 440, 78 Pac. 949; *Hibernia Sav. & L. Soc. v. Boland*, 145 Cal. 626, 629, 79 Pac. 365; *Peck v. Noee*, 154 Cal. 351, 354, 97 Pac. 865; *Hibernia Sav. & L. Soc. v. Dickinson*, 167 Cal. 616, 140 Pac. 265; *Pacific Imp. Co. v. Maxwell*, 26 Cal. App. 265, 146 Pac. 900; *Dunn v. Warden*, 28 Cal. App. 202, 151 Pac. 671; *Merrill v. Kohlberg*, 29 Cal. App. 382, 155 Pac. 824.

is deemed controverted by the plaintiff.²⁴ A like rule prevails in all states that have a similar statutory provision, as in Idaho,²⁵ Nevada,²⁶ Utah,²⁷ and elsewhere. But this provision of the code does not apply to co-defendants in the action so as to raise an issue between such co-defendants and the defendant answering. Ordinarily, as between themselves, co-defendants are not adversaries. They become such only in those cases in which one of the defendants in an action files a pleading in the nature of a cross-complaint, in which affirmative relief is sought against one or more of the other co-defendants. When this is done they lose their identity as defendants and, for the purposes of the cross-complaint, become plaintiffs and defendants in a new action. The cross-complaint must be served upon all parties adversely affected thereby, and until it is so served the adverse defendants are not in court upon the claim presented in the cross-complaint, which becomes effective after service, only.²⁸ After service is made the co-defendants become defendants in the new action raised by the cross-complaint, and must traverse the material allegations thereof affecting them, or be deemed to have admitted their truth.

§ 744. OMISSION TO PLEAD—PRESUMPTION THEREFROM. Under the reformed system of judicature the pleader is required to set out fully and concisely all the facts relied

²⁴ Id.; *People ex rel. Carrillo v. De la Guerra*, 24 Cal. 73, 78; *Bryan v. Maume*, 28 Cal. 238, 243; *Doyle v. Franklin*, 40 Cal. 106, 110; *Brooks v. Haslam*, 65 Cal. 421, 422, 4 Pac. 399; *Williams v. Dennison*, 94 Cal. 540, 543, 29 Pac. 946; *Haines v. Snedigar*, 110 Cal. 18, 21, 42 Pac. 462; *Paden v. Goldbaum*, 4 Cal. Unrep. 767, 37 Pac. 759; *Reed v. Johnson*, 127 Cal. 538, 541, 59 Pac. 986; *Green v. Duvergey*, 146 Cal. 379, 388, 80 Pac. 234.

²⁵ *Alspaugh v. Reid*, 6 Idaho 223, 225, 55 Pac. 300.

²⁶ *Gulling v. Washoe County Bank*, 28 Nev. 450, 82 Pac. 800.

²⁷ *Steed v. Harvey*, 18 Utah 367, 378, 72 Am. St. Rep. 789, 54 Pac. 1011.

²⁸ See *White v. Patton*, 87 Cal. 151, 25 Pac. 270; *Clements v. Davis*, 155 Ind. 631, 57 N. E. 905; *Gulling v. Washoe County Bank*, 28 Nev. 450, 82 Pac. 800.

upon as a cause of action or defense. This is in line with the requirement by the common-law system of pleading requiring the facts to be sufficiently pleaded. Under neither system can a pleading be aided by facts not averred.¹ Fraud, not specifically charged, will not be inferred from the facts;² and it is not sufficient to charge fraud epithetically,—it must be done by setting out the facts constituting the fraud.³ Neither can an omission of a special count or allegation, necessary in a pleading, be aided by notice of special matter to be offered in evidence under the common counts pleaded.⁴

Although pleadings are to be liberally construed, with a view to substantial justice between the parties, in California⁵ and other jurisdictions having the reformed judicature, yet courts are not authorized to supply omissions in the pleadings.⁶ Another well-settled rule in the construction of pleadings is that pleadings are to be most strongly construed against the pleader in case of ambiguity, imperfections and omissions;⁷ and the absence of a material allegation raises the presumption that it does not exist,⁸ or that the opposite is true,⁹—that the facts are against the pleader. Thus, where, in an action against a manufacturing company furnishing gasoline to a merchant, for personal injuries to a customer resulting from an explosion of the gasoline, the complaint fails to allege

¹ *San Diego County v. Utt*, 173 Cal. 554, 160 Pac. 657.

² *Bartholomew v. Derby Rubber Co.*, 69 Conn. 521, 61 Am. St. Rep. 57, 38 Atl. 45.

³ *San Diego County v. Utt*, 173 Cal. 554, 559-561, 160 Pac. 657.

⁴ *Smith v. Cowles*, 123 Mich. 4, 81 N. W. 916.

⁵ See *Kerr's Cyc. Cal. Code Civ. Proc.*, § 452.

For full discussion, see, post, §§ 751 et seq.

⁶ *Jones v. Packard*, 101 Misc. (N. Y.) 117, 166 N. Y. Supp. 721.

⁷ *Bowen v. Emerson*, 3 Ore. 452. See, also, footnote 14, this section; and, post, § 756.

⁸ *Suman v. Inman*, 3 Mo. App. 596; *Chicago, R. I. & P. R. Co. v. Shepherd*, 39 Neb. 523, 58 N. W. 189; *Stillings v. Van Allstine*, 2 Neb. Unof. 684, 89 N. W. 756.

⁹ *New Albany & S. R. Co. v. Connelly*, 7 Ind. 32; *Marples v. Standard Oil Co.*, 71 N. J. L. 352,

⁷ 9 Atl. 32.

that the gasoline was put in the tank in the store by the manufacturing company without the permission or authority of the merchant so to do, it raises the presumption that the gasoline was placed in the tank with the permission or by the authority of the merchant.¹⁰

Agreement or contract declared on, not alleged to have been in writing, will be presumed to have been verbal.¹¹ Thus, a transfer of property from a husband to his wife alleged, without an averment that the transfer was in writing, it will be presumed to have been by parol, where it was required to be in writing to be valid as against third persons.¹² Although it has been said that where a pleading contains no allegation that an agreement sued on was verbal, it will be presumed by the court, in support of the pleading, that it was in writing, where, under the requirements of the law, a writing was essential to the validity of the agreement.¹³

Duty of defendant, who has knowledge of facts which would relieve him from liability, is to plead those facts in defense, and on his failure to so plead, the presumption most unfavorable to him will be indulged.¹⁴ Thus, where a complaint sets up that the plaintiff was induced by fraud to enter into a contract with the defendant, on which contract the defendant sued and recovered a judgment, from which judgment plaintiff seeks to be relieved, it will be presumed that the plaintiff, with full knowledge of the existence of the fraud, purposely refrained from setting it up as a defense in the former suit.¹⁵

Express averment of a fact is not essential in those cases in which, from the pleading, such fact can be in-

¹⁰ Marples v. Standard Oil Co., 71 N. J. L. 352, 59 Atl. 32. Co., 111 Mo. App. 504, 86 S. W. 491.

¹¹ Clodfelter v. Hulett, 72 Ind. 137; Schreiber v. Butler, 84 Ind. 576. ¹⁴ Yount v. Setzer, 155 N. C. 213, 71 S. E. 209.

¹² Combs v. Cardwell, 164 Ky. 542, 175 S. W. 1009. See, also, footnote 7, this section.

¹³ Wall v. Continental Casualty Co., 6, 69 N. E. 455. ¹⁵ Cannon v. Castleman, 162 Ind.

ferred;¹⁶ such inference must naturally and necessarily arise;¹⁷ and a fact essential to a cause of action or a defense, not alleged, is not to be inferred from other facts specifically averred, where those facts averred are not inconsistent with the opposite fact to the fact omitted.¹⁸ It has been said that in a suit against a carrier to recover for services in wharfage and handling of goods or freight, the carrier will be presumed to be the shipper, where the pleadings fail to show that it was not.¹⁹

§ 745. PLEADING BAD IN PART—EFFECT OF. We have already sufficiently discussed and illustrated, in this chapter, that general rule of pleading founded upon the well-known maxim, *utile per inutile non vitiatur*—the useful is not vitiated by the useless. This rule is particularly applicable to a pleading which is bad in part and good in part. Where a complaint consists of two or more counts or causes of action, if one of the counts or causes of action is good, the pleading is sufficient to sustain a cause of action, and will support a finding or verdict based thereon.¹ Thus, a complaint by a sheriff to recover (1) his per diem for attendance at court, which is a valid claim, joined with a count to recover (2) fees for receiving and discharging prisoners, which is an invalid claim,

¹⁶ *Richardson v. El Paso Consol. Gold Min. Co.*, 51 Colo. 440, 118 Pac. 982.

¹⁷ *Soule v. Weatherby*, 39 Utah 580, 118 Pac. 833.

¹⁸ *Jacobs v. Monaton Realty Investing Corp.*, 212 N. Y. 48, 105 N. E. 968, reversing 145 N. Y. Supp. 611, which affirmed 80 Misc. 649, 141 N. Y. Supp. 1033.

¹⁹ *Southern Cotton Oil Co. v. Central Georgia R. Co.*, 142 C. C. A. 627, 228 Fed. 335, affirming 204 Fed. 476.

¹ *American Hard Rubber Co. v.*

Howe, 280 Ill. 431, 117 N. E. 425, reversing judgment in 203 Ill. App. 353; *Madison Coal Co. v. Beam*, 63 Ill. App. 178; *Chicago City R. Co. v. Leach*, 80 Ill. App. 354; reversed on another point, 182 Ill. 359, 55 N. E. 334; *Chicago & A. R. Co. v. Harbor*, 80 Ill. App. 607; *Shickle-Harrison & Howard Iron Co. v. Beck*, 112 Ill. App. 444; *Axtell v. Workman*, 17 Ind. App. 152, 46 N. E. 472; *Tangney v. Sullivan*, 183 Mass. 166, 39 N. E. 799; *Gourley v. Smith*, 78 Wash. 286, 139 Pac. 58.

is good;² a suit for the possession of property brought on the dual ground (1) as trustee under an instrument executed by decedent in his life time, and (2) as executor and trustee under a will, does not render the complaint bad because the first ground of the action is based upon an instrument which was, in effect, a power of attorney only, and was revoked by the death of the party giving it;³ and a complaint with alternative prayers, based upon allegations which are not in the disjunctive, is not bad because one of the grounds alleged is insufficient.⁴

An answer with two or more pleas, where one of the pleas is good, though the balance are insufficient, or found to be untrue, is sufficient to defeat the action; the bad plea or pleas not subverting the good plea made in the same answer.⁵ And where one paragraph or plea in an answer, or in a reply, is good, the sufficiency of the pleading can not be considered, unless there is a demurrer thereto.⁶

Misjoinder can not be alleged where two or more counts or pleas are contained in a complaint or other pleading, one of which is good and the other or others fail to state a good cause of action or defense, because there can be a misjoinder of good causes of action or defense, only.⁷ The proper method of making objection in such a case is

² *Davless County Commrs. v. Fitzgerald*, 40 Ind. App. 24, 79 N. E. 393.

³ *Gourley v. Smith*, 78 Wash. 286, 139 Pac. 58.

⁴ *Thompson v. Brown (Ala.)*, 76 So. 298.

⁵ *American Hard Rubber Co. v. Howe*, 280 Ill. 431, 117 N. E. 425, reversing judgment in 203 Ill. App. 353; *Wertheim v. Maintenance Co.*, 135 App. Div. (N. Y.) 760, 119 N. Y.

Supp. 909; *Henry v. Ohio River R. Co.*, 40 W. Va. 234, 21 S. E. 863.

⁶ *Andrews v. Swanton*, 81 Ind. 474.

⁷ *Flint v. Hubbard*, 16 Colo. 464, 66 Pac. 446; *Furry v. O'Connor*, 1 Ind. App. 573, 28 N. E. 103; *Lee v. Simpson*, 29 Wis. 333.

Complaint of two paragraphs, one of which is insufficient to state a cause of action, there can be no misjoinder.—*Furry v. O'Connor*, 1 Ind. App. 573, 8 N. E. 103.

by special demurrer for failure to state a cause of action or defense.³

§ 746. VARIANCE AND DEFECTS—WHAT ARE AND EFFECT OF. The rule is well established that the allegata and probata must correspond, and that the plaintiff must prove his case as alleged in his complaint,¹ yet the procedural codes uniformly provide that an error or defect that does not affect a substantial right shall be disregarded.² This provision of these codes has been most beneficial in doing away with the technicalities of the common law, and should be liberally construed.³ And a disregard of a

³ *Flint v. Hubbard*, 16 Colo. 464, 66 Pac. 446.

¹ *Gould's Pl.* 160; *Stout v. Coffin*, 28 Cal. 65; *Hathaway v. Ryan*, 35 Cal. 188; *Clark v. Phoenix Ins. Co.*, 36 Cal. 168, 175; *Tomlinson v. Monroe*, 41 Cal. 94; *Johnson v. Moss*, 45 Cal. 515; *Mondran v. Goux*, 51 Cal. 151; *Devoe v. Devoe*, 51 Cal. 543; *Goss v. Strelitz*, 54 Cal. 641; *Murdock v. Clarke*, 59 Cal. 683; *Evans v. Bailey*, 66 Cal. 112, 4 Pac. 1089; *Bryan v. Tormey*, 84 Cal. 130, 24 Pac. 319; *Owen v. Meade*, 104 Cal. 179, 182, 37 Pac. 923; *Davis v. Pacific Tel. & Tel. Co.*, 127 Cal. 312, 321, 59 Pac. 658; *Nichols v. Randall*, 136 Cal. 426, 431, 69 Pac. 26; *Higgins v. Graham*, 143 Cal. 131, 134, 76 Pac. 898; *Brewster v. Crossland*, 2 Colo. App. 446, 31 Pac. 236.

"Consequence of variance between the averments in a pleading and the proof are the same under our system of practice as at common law, except that they may be, to a great extent, obviated by amendments to pleadings, which are allowed with great liberality."—*Stout v. Coffin*, 28 Cal. 65.

"Plaintiff must recover, if at all,

upon the cause of action set out in the complaint, and not upon some other, which may be developed by the proof."—*Mondran v. Goux*, 51 Cal. 151.

² See *Kerr's Cyc. Cal. Code Civ. Proc.*, § 475.

³ *Peters v. Foss*, 20 Cal. 587; *Began v. O'Reilly*, 32 Cal. 11; *Carpentier v. Small*, 35 Cal. 363.

As to what constitutes a material variance between pleadings and proofs, see *Kerr's Cyc. Cal. Code Civ. Proc.*, § 469.

Defeated party not misled to his prejudice a judgment will not be reversed because of a variance between the pleadings and the proof.—*Began v. O'Reilly*, 32 Cal. 11; *Waugenheim v. Graham*, 39 Cal. 169, 175; *Ballinger v. Ballinger*, 154 Cal. 695, 702, 99 Pac. 196, 199; *Thalheimer v. Crow*, 13 Colo. 397, 405, 22 Pac. 779; *North Star Boot & Shoe Co. v. Stebbins*, 3 S. D. 540, 543, 54 N. W. 593.

Variance not material court may (1) direct the fact to be found according to the evidence, or (2) may order an immediate amendment.—*Kerr's Cyc. Cal. Code Civ. Proc.*, § 470. See, also, *Began*

variance may be held equivalent to an amendment at the trial.⁴ A variance between the pleadings and proof, if it be not a material variance,—that is, one which has actually misled the adverse party to his prejudice,—shall not be regarded.⁵ But where the allegations in a pleading, to which the proof is directed, remain unproved in their entire scope and meaning, it is not a case of variance to be disregarded, and an amendment will not be allowed unless it clearly appear to be in furtherance of justice to allow it.⁶ If evidence is offered by the plaintiff at variance with the allegations of the complaint, and the counsel for the defense does not object to it at the time, nor move to strike it out upon the ground of variance, this error is waived.⁷

v. O'Reilly, 32 Cal. 11; *Davis v. Baugh*, 59 Cal. 568; *Herman v. Hecht*, 116 Cal. 553, 48 Pac. 611; *Stockton Combined-Harvester & Agric. Works v. Glenns Falls Ins. Co.*, 121 Cal. 167, 53 Pac. 565; *Duke v. Huntington*, 130 Cal. 272, 62 Pac. 510; *Carter v. Rhodes*, 135 Cal. 46, 66 Pac. 985; *Foster v. Carr*, 135 Cal. 83, 67 Pac. 43; *Ballinger v. Ballinger*, 154 Cal. 695, 702, 99 Pac. 196.

⁴ *Mulliken v. Hull*, 5 Cal. 245; *Smith v. Roe*, 7 Colo. 95, 1 Pac. 909; *Coleman v. Playsted*, 36 Barb. (N. Y.) 26; appeal dismissed, 40 N. Y. 341.

Judgment irregular in that it embraces too many parties, the proper practice is, not to reverse it for the irregularity, but to move to correct the judgment of the court below.—*Morrison v. Dapman*, 3 Cal. 257; *Mulliken v. Hull*, 5 Cal. 245, 246; *De Castro v. Richardson*, 25 Cal. 53; *Russet v. Boyle*, 45 Cal.

64; *Fox v. West*, 1 Idaho 782, 784.

⁵ *Kerr's Cyc. Cal. Code Civ. Proc.*, §§ 469-471; *Began v. O'Reilly*, 32 Cal. 11; *Plate v. Vega*, 31 Cal. 383; *Dunn v. Durant*, 9 Daly (N. Y.) 389, 391; *Lettman v. Ritz*, 5 N. Y. Super. Ct. Rep. (3 Sandf.) 743; *Engel v. Hardt*, 56 Wis. 456, 14 N. W. 625.

⁶ *Egert v. Wicker*, 10 How. Pr. (N. Y.) 193; *Catlin v. Hansen*, 8 N. Y. Super. Ct. Rep. (1 Duer) 309.

⁷ CAL.—*Boyce v. California Stage Co.*, 25 Cal. 460, 471; *Bell v. Knowles*, 45 Cal. 193. COLO.—*King v. De Coursey*, 8 Colo. 463, 9 Pac. 31; *McDermott v. Grimm*, 4 Colo. App. 39, 34 Pac. 909. MINN.—*Cummings v. Petsch*, 41 Minn. 115, 42 N. W. 789. N. Y.—*Coates v. First Nat. Bank*, 91 N. Y. 20, 31; *Gillies v. Manhattan Beach Imp. Co.*, 147 N. Y. 420, 42 N. E. 196, affirming 73 Hun 507, 26 N. Y. Supp. 381. OHIO—*Sibila v. Balmey*, 34 Ohio St. 399.

A variance in the evidence from the pleadings which does not surprise or injure either party, does not affect their substantial rights.⁸ When the allegation is unproved, not in some particular or particulars only but in its entire scope and meaning, it is not deemed a variance, but a failure of proof.⁹ And when a party alleges that there is a variance between the allegations of a pleading and the proof, it will be deemed immaterial, and is to be disregarded unless the adverse party has been actually misled to his prejudice by such variance, and that fact must be proved to the satisfaction of the court.¹⁰ And it is neither necessary nor proper to anticipate, in a complaint, circumstances which may transpire at the trial, and no advantage can be taken of a variance between the case made on the trial and that stated in the complaint, when produced in this way.¹¹

§ 747. — MATERIAL AND IMMATERIAL VARIANCES. As to what constitutes a material variance and what variance is immaterial, it will be impossible to enter upon a full discussion of all the cases in this place; suffice it to say that (1) a variance in the proofs offered establishing a cause other than that set out, or (2) variant from the statements in the pleading, surprising or injuriously affecting the opposite party, the variance is material; and (3) where the variance does not surprise or injure the adverse party, and is as to a matter amendable in the trial court on the trial, or even after the cause is closed, the variance is immaterial. Thus, under a complaint charging the defendant as a common carrier, no recovery can be had upon proof of a liability as a private carrier only.¹ So, an

⁸ *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369.

⁹ *Stokes v. Brown*, 20 Ore. 530, 26 Pac. 561; *North Star Boot & Shoe Co. v. Stebbins*, 3 S. D. 540, 54 N. W. 593.

¹⁰ *Id.*

¹¹ *Travelers' Ins. Co. v. Jones*, 16 Colo. 515, 27 Pac. 807; *Minzheimer v. Bruns*, 1 App. Div. (N. Y.) 324, 37 N. Y. Supp. 261.

¹ *Honeyman v. Oregon & C. R. Co.*, 13 Ore. 352, 10 Pac. 628.

alleged cause of action for goods sold and delivered is not sustained by proof of delivery of the goods to the defendant, to be sold on commission;² but proof of a sale and readiness to deliver will sustain an allegation of sale and delivery.³ A claim of lien for materials furnished must state the facts required by statute, but need not state what relation the person to whom they were furnished bore to the owner, or whether he had authority to bind the owner, or to entitle the materialman to a lien. And where the claim for a lien states that the material was furnished to a contractor or subcontractor, naming him, the claimant may, upon foreclosure of the lien, aver facts showing that the contract with the owner was void, and that he is deemed, under the statute, to have furnished the materials to the owner, and there is no material variance between the claim of lien and such averments.⁴ In an action against a railroad company to recover damages for injuries caused by fire, the complaint alleged that through the negligence of the defendant fire from its locomotives was suffered to escape and did escape, and by reason thereof came upon the land of the plaintiff, causing the injury complained of, and the evidence was that the fire commenced on the land of another, from which it spread to the land of the plaintiff, it was held that there was no variance.⁵ A judgment can not be sustained upon appeal, when the case proved and found is not the case made by the complaint, although another good cause of action may appear in favor of the plaintiff.⁶ The general rule is that

² *Evans v. Bailey*, 66 Cal. 112, 4 Pac. 1089; *Eldinger v. Sigwart*, 13 Cal. App. 667, 674, 110 Pac. 521.

³ *Carter v. Carter*, 101 Ind. 450.

⁴ *Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860.

As to variance between complaint and record in such a case, see *Hagman v. Williams*, 88 Cal. 146, 23 Pac. 1111.

⁵ *Butcher v. Vaca Valley & C. L. R. Co.*, 67 Cal. 518, 8 Pac. 174.

⁶ *Bryan v. Tormey*, 84 Cal. 126, 24 Pac. 319; *Jackson v. Miner*, 101 Ill. 550; *Bender v. Bender*, 14 Ore. 353, 12 Pac. 713.

As to material variance between summons and complaint, see *Haynes v. McKee*, 18 Misc. (N. Y.) 361, 41 N. Y. Supp. 553; affirmed,

the complaint must agree with the summons in the description of the parties.⁷ On the contrary it was held in New Hampshire, that the description of the defendants as partners under a particular name or firm in the writ, is not an averment that they promised by that name. Proof of the promise by another name is, therefore, not a variance.⁸ It was held in New York, that a complaint setting forth a conversion by the defendant, of money

19 Misc. 511, 43 N. Y. Supp. 1126; St. Paul Harvester Co. v. Forberg, 2 S. D. 357, 50 N. W. 628.

⁷ CAL.—Lyman v. Milton, 44 Cal. 630, 632 (complaint against A and B, and summons named "A et al" and served upon A and B; held insufficient; the words "et al," in the connection used were without significance). GA.—Smith v. Morris, 29 Ga. 339 (summons indorsed on back of complaint, but which omitted the name of the defendant, held to be good, the complaint correcting the omission in the summons); Baldwin v. McMichal, 68 Ga. 828 (defendant misnamed in summons); Scudder v. Massengill, 88 Ga. 245, 14 S. E. 571 (summons described plaintiff as New England Security Company instead of Harriot L. Scudder,—but acknowledgment of service was held to waive the defect); Neal-Millard Co. v. Owens, 115 Ga. 959, 42 S. E. 266 (complaint against A and B, summons ran against A and C, service on B; service vacated and permit to amend summons refused). ILL.—Wildley v. Wight, 71 Ill. 374 (summons described plaintiff as Wright instead of Wight; after plea in abatement plaintiff was permitted to amend summons by inserting his true name). MICH.—Finlay v. Backus, 18 Mich. 218 (summons described plaintiff as

Absolem Baxter instead of Absclom Backus; after default of plaintiff entered by defendant, plaintiff was permitted to correct the summons by inserting his true name). MO.—Jones v. Cox, 7 Mo. 173 (name of one of plaintiffs omitted from summons; amendment of summons to make it conform to complaint allowed). N. Y.—Tuttle v. Smith, 6 Abb. Pr. 329, 336, 14 How. Pr. 395; Blanchard v. Straight, 8 How. Pr. 83; Allen v. Allen, 14 How. Pr. 248 (wrong first name of plaintiff in summons, complaint served later with correct first name.) ORE.—White v. Johnson, 27 Ore. 282, 50 Am. St. Rep. 726, 40 Pac. 511 (provision requiring summons to contain the names of the parties is mandatory). FED.—Gulf, C. & S. F. R. Co. v. James, 1 C. C. A. 53, 4 U. S. App. 19, 48 Fed. 149 (summons described plaintiff as Philip R. Jones instead of James, but case reversed upon another point).

As to copy of complaint served with copy of summons supplying omissions and correcting defects in summons, see First Nat. Bank v. Rusk, 64 Ore. 35, 44 L. R. A. (N. S.) 138, 127 Pac. 780, 129 Pac. 121.

See, also, note 44 L. R. A. (N. S.) 138-146.

⁸ Brown v. Jewell, 18 N. H. 230.

deposited with him, and demanding the amount of such money, is not a variance from a summons for a money demand on contract.⁹ So it has been held by the Supreme Court of the United States, that a variance between pleadings and findings will not be regarded where there is no allegation that the findings were unwarranted by the proofs.¹⁰ And where, in an action against a common carrier for not complying with a contract to carry or deliver a draft, the complaint alleged that it was signed "John Q. Jackson," the proof showed that it was signed "John Q. Jackson, Agent," it was held that the variance was immaterial.¹¹ The addition of the word "agent" was merely *descriptio personæ*, and without legal effect;¹² if it had been signed "as agent," a different rule would apply.¹³

§ 748. — ILLUSTRATIONS OF MATERIAL VARIANCES. A few specific illustrations of material variance, without attempting to be exhaustive, either of the subjects or of the cases, may not be without advantage as showing the practical application of the rule discussed in the preceding sections. Thus, a plaintiff will not be allowed to recover upon an implied covenant in a lease, totally different from the express covenant declared on, when objection is specifically made, though not taken until the evidence is all in.¹ Deceit charged in a declaration of tort, alleging that the plaintiff, through his agent, procured the defendants to furnish and deliver to him a certain article, and that they negligently and carelessly furnished a different article, and that he sustained an injury by the use of the article furnished, believing it to be that which he ordered, is not sustained by proof that the plaintiff bought the

⁹ *Goff v. Edgerton*, 18 Abb. Pr. (N. Y.) 381.

¹⁰ *New Orleans, O. & G. W. R. Co. v. Lindsay*, 71 U. S. (4 Wall.) 650, 18 L. Ed. 328; *Westinghouse v. Carleton*, 120 C. C. A. 443, 202 Fed. 132.

¹¹ *Zeigler v. Wells, Fargo & Co.*, 28 Cal. 263.

¹² See, post, § 814.

¹³ See, post, §§ 811, 817.

¹ *Merritt v. Clossen*, 36 Vt. 172.

article of a third person, who obtained it of the defendants.² Where the plaintiff relies on a promise, and the complaint alleges a single promise for the performance of two different things, founded upon an entire consideration, and the evidence shows two promises, at different times, upon distinct considerations, that is a fatal variance.³ A promissory note the subject-matter of the action, it has been held that a declaration upon an agreement to discharge the plaintiff from all liabilities, on account of certain purchases, as one of a firm recently dissolved, which alleges that a certain note was due from the firm at the time when the agreement was made, is not sustained by proof that such a note was afterwards given for a liability of the firm; but an amendment would be allowed on terms.⁴ Complaint in tort charging two or more with a joint trespass can not be sustained by evidence that the trespass was committed by one, only.⁵

*Theory of case*⁶ is as much a part of the essentials of the action as are the allegations, in many instances; and the plaintiff must recover, and the defendant defeat the action, upon the theory declared on.⁷ Where the gravamen of an action is fraud, and the plaintiff fails to establish the fraud, he can not maintain the action on the theory that a liability founded on contract was disclosed by the evidence.⁸ And a plaintiff will not be permitted to amend his complaint so as to change the proceedings from an action *ex delicto* to an action *ex contractu*,⁹ to make the complaint conform to the evidence in the case.

² Davidson v. Nichols, 90 Mass. (8 Allen) 75.

³ Hart v. Chesley, 18 N. H. 373.

⁴ Nichols v. Prince, 90 Mass. (8 Allen) 404. See Luna v. Mohr, 4 N. M. 63, 1 Pac. 860; Orr v. Hopkins, 3 N. M. 183, 3 Pac. 61.

⁵ Davis v. Cassell, 50 Me. 294.

⁶ As to theory of case, see, ante, §§ 528-534.

⁷ Peaxy v. Salt Lake City, 11 Utah 331, 40 Pac. 206.

⁸ People v. Dennison, 84 N. Y. 272.

⁹ Hackett v. Bank of California, 57 Cal. 335; Wheeler v. West, 78 Cal. 95, 96, 20 Pac. 45; Flanders v. Cobb, 88 Me. 488, 51 Am. St. Rep. 410, 34 Atl. 277. See Frost v. Witter, 132 Cal. 421, 427, 84 Am. St. Rep. 53, 64 Pac. 705.

§ 749. — ILLUSTRATIONS OF IMMATERIAL VARIANCE. To be material a variance must be one that affects the merits of the case and jeopardizes the interests and rights of the other party.

Amount set out in the complaint need not be proved by evidence establishing it exactly in dollars and cents; and especially is the variance immaterial when a less amount is established.¹

Consideration stated in the count of a complaint, and it is proved that the defendant undertook to do an act in addition to that, the nonperformance of which is stated in the count, this does not constitute a material variance.² A written agreement in this form: "Borrowed and received of A, two hundred and sixty dollars, which I promise to pay on demand, with interest," imports a consideration on its face; and if the defendant in an action upon it has introduced evidence tending to show that it was given without consideration, the plaintiff may prove that it was given in payment of a debt of a third person, although there is no averment to that effect in the declaration.³ Where a complaint alleged that the consideration of a contract was five thousand five hundred dollars, and the proof was that the consideration was a sight draft, this held not to be a variance.⁴

Dates are regarded as material, usually, unless they are of the gist of the action, and a variance in the proof from the time laid in the complaint will be immaterial.⁵

See, also, note 51 Am. St. Rep. 414-435.

Motion to strike and not answer is proper method of objecting to such a change in the complaint, where there was no opportunity offered for objecting to the filing of the amended complaint.—*Wheeler v. West*, 78 Cal. 95, 96, 20 Pac. 45.

¹ Complaint described a judgment as rendered for costs in the

sum of \$19.30, and the judgment offered in evidence was rendered for \$18.30, the variance immaterial.—*Ritchie v. Carpenter*, 2 Wash. St. 512, 28 Pac. 380.

² *Morrill v. Richey*, 18 N. H. 295.

³ *Plate v. Vega*, 31 Cal. 383; *Cochran v. Duty*, 90 Mass. (8 All.) 324.

⁴ *Nash v. Towne*, 72 U. S. (5 Wall.) 689, 18 L. Ed. 527.

⁵ *Zorkowski v. Zorkowski*, 26

Thus, when a contract is alleged to have been made on a certain day, it is no variance to offer in evidence a written contract which took effect on a different day.⁶ Time stated in a pleading is often not material, and may be departed from in evidence.⁷ An averment in a complaint, that notice of nonpayment was given at a wrong date, is but a defect in form, and the subject of amendment. It is not necessary to aver the precise date when the notice was given. And the averment in the statement not being inconsistent with the fact that another notice was given at the proper time, if the parties go to trial on the merits, on the pleas of payment and payment with leave, and so forth, judgment will not be arrested on the ground of the insufficiency of the statement of notice of nonpayment.⁸

Description of land,⁹ and errors in directions¹⁰ are immaterial where the land is sufficiently identified. Thus, in a case where the proof, among other things, showed certain lands to extend a certain distance from the northeasterly instead of the northwesterly corner of the tract, as alleged in the complaint. The judgment followed the description in the complaint. On appeal it was held that the variance in the description of the premises did not prejudice appellant; that the question was one of *identity*, and the fact that the corner of the small tract was called the northeasterly instead of the northwesterly corner, was *itself* insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated

N. Y. Super. Ct. Rep. (3 Rob.) 613,
27 How. Pr. 37; United States v.
Le Baron, 71 U. S. (4 Wall.) 642,
18 L. Ed. 309.

⁶ Id.

⁷ Andrews v. Chadbourne, 19
Barb. (N. Y.) 147; People ex rel.
Crane v. Ryder, 12 N. Y. 433, af-
firming 16 Barb. 370; Banta v.

Martin, 38 Ohio St. 534; Willer v.
Bergenthal, 50 Wis. 474, 7 N. W.
352.

Compare: Halden v. Crafts, 4
E. D. Smith (N. Y.) 490, 2 Abb.
Pr. 301.

⁸ Loose v. Loose, 36 Pa. St. 538.

⁹ As to description of real prop-
erty in pleading, see, ante, § 729.

¹⁰ See, ante, § 742.

and identified the premises.¹¹ Likewise a misdescription of land in a fire insurance policy is immaterial where the risk is not thereby affected, the property can readily be identified, and the insurance agent knows the facts;¹² and it is not necessary to reform the description in the policy before bringing suit thereon.¹³

Joint liability of defendants shown by the proof, and thus may constitute a variance from the allegations in the complaint, yet if the objection is not taken in the mode pointed out by the procedural code, it is one which the defendants shall be deemed to have waived;¹⁴ but it is otherwise in case of tort.¹⁵

Nuisance declared on, charging that the defendant *dug*, opened, and *made*, is sustained by proof that he formed it partially by excavation, and partially by raising walls.¹⁶

Relief prayed for in the complaint and as stated in the summons should agree as to amount;¹⁷ but a variance in this respect is not ground for reversing the judgment on appeal. If necessary to sustain the judgment, the summons may be amended on appeal from the judgment, so as

¹¹ Paul v. Silver, 16 Cal. 73, 75; Calderwood v. Brooks, 28 Cal. 151.

Description of land in summons by reference to the complaint, a copy of which is served with a copy of the summons has the effect to make the complaint a part of the summons, and obviates the necessity of repeating the description in the summons.—Calderwood v. Brooks, 28 Cal. 151; People v. Dodge, 104 Cal. 487, 490, 492, 38 Pac. 203.

See discussion, ante, § 125.

¹² ILL.—German Ins. Co. v. Miller, 39 Ill. App. 637. KAN.—Kansas Farmers' Ins. Co. v. Saindon, 52 Kan. 493, 39 Am. St. Rep. 356, 35 Pac. 15. NEB.—State Ins. Co. v. Schreck, 27 Neb. 527, 20 Am.

St. Rep. 696, 6 L. R. A. 524, 43 N. W. 340; Phoenix Ins. Co. v. Gebhart, 32 Neb. 146, 49 N. W. 433; Omaha Fire Ins. Co. v. Dufek, 44 Neb. 243, 62 N. W. 465. TEX.—Aetna Ins. Co. v. Brannon, 99 Tex. 396, 13 Ann. Cas. 1020, 2 L. R. A. (N. S.) 551, 89 S. W. 1057.

¹³ German Ins. Co. v. Miller, 39 Ill. App. 637.

¹⁴ Lee v. Wilkes, 27 How. Pr. (N. Y.) 336.

¹⁵ See, ante, § 748, footnote 5 and text.

¹⁶ Robbins v. Chicago, City of, 71 U. S. (4 Wall.) 657, 18 L. Ed. 427.

¹⁷ Johnson v. Paul, 14 How. Pr. (N. Y.) 454, 6 Abb. Pr. 335, note.

to conform to the fact proved.¹⁸ An appearance waives defects of this kind in the summons.¹⁹

Statement of cause of action in complaint and in the summons, in those jurisdictions in which the summons is required to contain a statement of the cause of action, must agree;²⁰ but where there is a variance in this respect, if the complaint sets forth a good cause of action, and the defect is one that may be cured by amendment, it is cured by verdict.²¹ If the cause of action or defense be substantially proved, the failure to prove certain allegations precisely as laid, is an immaterial variance which will be totally disregarded.²²

§ 750. — ADVANTAGE OF VARIANCE — HOW TAKEN. Where there is a material variance between the pleading and the evidence, advantage thereof may be taken in different ways: (1) By objection on the trial to the admission of the evidence as proving a cause of action not pleaded; (2) by a motion to strike out the evidence as not responsive to the pleadings; and (3) by a motion for a nonsuit;¹ and the party is not precluded from moving for a nonsuit by the facts (a) that he failed to object to the evidence when it was offered,² or (b) the fact that he has introduced evidence.³

¹⁸ Willet v. Stewart, 43 Barb. (N. Y.) 98.

¹⁹ As to appearance and its effect, see, ante, §§ 255 et seq.

²⁰ Ridder v. Whitlock, 12 How. Pr. (N. Y.) 208; Boington v. Lapham, 14 How. Pr. (N. Y.) 360; Shafer v. Humphrey, 15 How. Pr. (N. Y.) 564; Campbell v. Wright, 21 How. Pr. (N. Y.) 13.

²¹ Robinson v. English, 34 Pa. St. 324; Garland v. Davis, 45 U. S. (4 How.) 131, 11 L. Ed. 907.

²² Union India Rubber Co. v. Tomlinson, 1 E. D. Smith (N. Y.)

364; Lettman v. Ritz, 5 N. Y. Super. Ct. Rep. (3 Sandf.) 374.

¹ Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458. See Barrere v. Soms, 113 Cal. 97, 45 Pac. 177.

² Farmer v. Cram, 7 Cal. 135; Johnson v. Moss, 45 Cal. 515; Tomlinson v. Monroe, 41 Cal. 94; Elmore v. Elmore, 114 Cal. 516, 521, 46 Pac. 458.

³ Defendant introducing evidence not estopped to move for nonsuit on this ground.—See Farmer v. Cram, 7 Cal. 135; Elmore v. Elmore, 114 Cal. 516, 521, 46 Pac.

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CHAPTER II.

CONSTRUCTION OF PLEADINGS.

- § 751. In general.
- § 752. General principles of construction.
- § 753. ——— Meaning of words and rules of grammar.
- § 754. ——— Popular meaning of words and phrases.
- § 755. ——— ——— Illustrations of meaning of words and phrases.
- § 756. ——— Ambiguous words and phrases.
- § 757. ——— Averments in pleading considered, only.
- § 758. ——— Technicalities and technical objections.
- § 759. ——— Entire pleading to be considered.
- § 760. ——— General and specific allegations—Clauses of sentence.
- § 761. ——— Facts only to be regarded.
- § 762. ——— Real intent to be effectuated.
- § 763. In Arizona.
- § 764. In Colorado.
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- § 766. In Kansas.
- § 767. In Montana.
- § 768. In Nevada.
- § 769. In New Mexico.
- § 770. In North Dakota.
- § 771. In Oklahoma.
- § 772. In Oregon.
- § 773. In South Dakota.
- § 774. In Utah.
- § 775. In Washington.
- § 776. In Wyoming.

§ 751. IN GENERAL. The procedural codes prescribe rules by which the sufficiency of pleadings shall be determined, abrogating the common-law rule requiring that a pleading shall be strictly construed against the pleader; but in many instances these codes simply point out cer-

tain landmarks by which the pleader is to be guided, leaving much to the wisdom and judicial discretion of the presiding judge. Thus, the California Code of Civil Procedure provides that “the rules by which the sufficiency of pleadings is determined, shall be those prescribed by this code,”¹ and later further provides that “in the construction of a pleading, for the purpose of determining its effect, its allegations are to be liberally construed, with a view to substantial justice between the parties”;² and these being substantially all the provisions relating to the construction of pleadings provided by that code, it leaves much to be desired by those who must have a set rule for every step taken, and by which to measure the sufficiency of every pleading.

Common-law rules and decisions of the courts alone can supply the defect in the brevity and generalness of the code provisions regarding the construction of pleadings, and are still assistful in determining the sufficiency of a pleading attacked or sought to be attacked. While the common-law forms,³ fictions,⁴ and distinctions between actions⁵ have been abolished, the nature and classification of the actions themselves are not abolished,⁶ and in their inherent nature the various classes of action at common law are as separate and distinct as they were before the distinctions and forms of action were abolished. All the common-law rules of pleading, as to matters not expressly directed by statute, remain unchanged by the procedural codes.

§ 752. GENERAL PRINCIPLES OF CONSTRUCTION. The first general fundamental rule in the construction of a pleading in a cause is that it is a matter of law for the court,¹

¹ Kerr's Cyc. Cal. Code Civ. Proc., § 421.

² Id., § 452.

³ See, ante, § 29.

⁴ See, ante, § 30.

⁵ See, ante, § 523.

⁶ See, ante, §§ 524-526.

¹ Taylor v. Middleton, 67 Cal. 656, 657, 8 Pac. 594; Gilde v. Dwyer, 83 Cal. 477, 479, 23 Pac. 706.

and not a question of fact for the jury.² It being the duty of the trial judge to construe the pleadings in an action,³ it will be reversible error for him to submit the question of the construction of the pleadings to the jury,⁴—e. g., by instructing the jury that “if they should find that the defendant, in his answer, denies plaintiff’s title, possession, and right to possession,” etc.⁵

§ 753. — MEANING OF WORDS AND RULES OF GRAMMAR. In the construction of pleadings courts are to be governed by the ordinary meaning of words and the established rules of grammar and syntax, in passing upon and determining objections for ambiguity,¹ uncertainty, and unintelligibility; or in passing upon and determining form and sufficiency. The allegations in a pleading are to be construed by giving to the words their ordinary² and not a technical³ meaning, and to sentences and phrases their ordinary,—and not a forced,—grammatical and syntactic construction, to effectuate the manifest intention of the pleader.⁴ An absurd construction should never be given,

² See *Alexander v. Wheeler*, 69 Ala. 332; *Earle v. Westchester Fire Ins. Co.*, 29 Mich. 414.

³ *Taylor v. Middleton*, 67 Cal. 656, 657, 8 Pac. 594.

⁴ *Id.*

⁵ *Id.*

¹ Objection of ambiguity and that several causes of action are united in one count is not tenable where it is perfectly plain by the pleading that the defendant was sufficiently informed, although not with the utmost perspicuity (see, ante, §§ 733, 735), that the plaintiff demanded of him a specified sum of money; that this was made up of amounts of money which he had received from the plaintiff in excess of what was due on a certain judgment, afterwards modified by the court, which, together

with interest and percentage added, amounted to the sum demanded.—*Applegarth v. Dean*, 68 Cal. 491, 495, 13 Pac. 587.

See, also, post, § 755.

² See, post, § 754.

³ See, post, § 757.

⁴ See, post, § 762.

Garnishment by judgment creditor, complaint alleging that debtor, by written instrument, has sold to defendant certain cattle on which there was a chattel mortgage to third persons; that the mortgagees, by a written instrument attached to the contract of sale, consented thereto on condition that the money received as the proceeds of the sale should be paid to them, and that the defendant, notwithstanding plaintiff’s garnishment, had paid the money to the

where the allegations are reasonably susceptible of a different one.⁵ Thus, an allegation in a complaint in ejectment that on a designated date the plaintiff was "possessed" of certain described lands, which he "claims in fee simple absolute," is to be construed as alleging title in fee simple.⁶ A complaint in an action against a railroad corporation charging the negligent killing of stock by its trains, which alleges that the defendant railway tracks "is not fenced," can not be construed as alleging that the railway track was not fenced at the time of the act complained of.⁷

§ 754. — POPULAR MEANING OF WORDS AND PHRASES. We have already observed that the ordinary,—that is, the popular,—meaning of words and phrases, as distinguished from their technical¹ or unusual meaning, is to be given to the language of the allegations in a pleading in construing the same;² but in those cases in which the words and phrases made use of have two or more ordinary or popular meanings, in the construction thereof that meaning is to be adopted which is most unfavorable

mortgagees. Complaint was construed to allege that the contract required the money to be paid to the mortgagees, and that there was no showing that there was anything in the hands of the defendant subject to garnishment, as all ambiguities on the face of the complaint were to be construed against the pleader.—*McIntyre v. Hauser*, 131 Cal. 11, 63 Pac. 69.

⁵ *Marshall v. Shafter*, 32 Cal. 176.

⁶ *Id.*; *Henley v. Hotaling*, 41 Cal. 29; *Dugas v. Hammond*, 130 Ga. 89, 60 S. E. 269.

⁷ *Baker v. Southern Cal. R. Co.*, 114 Cal. 501, 46 Pac. 604.

¹ See, post, § 757.

² *Chitty on Pleading* (16th Am.

ed.), p. 261. See, also: ILL.—*Rock Island, City of, v. Cuinely*, 126 Ill. 408, 18 N. E. 753. N. Y.—*Pelton v. Ward*, 3 Cal. 73, 76, 2 Am. Dec. 251; *Backus v. Richardson*, 5 Johns. 476; *Woodberry v. Sockrider*, 2 Abb. Pr. 405; *Mann v. Morewood*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 557. PA.—*Brown v. Lamberton*, 2 Binn. 37; *Walton v. Singleton*, 7 Serg. & R. 449. FED.—*Respublica v. De Longchamps*, 1 U. S. (1 Dall.) 111, 1 L. Ed. 59; *Rue v. Mitchell*, 2 U. S. (2 Dall.) 59, 1 L. Ed. 288. ENG.—*Woolnoth v. Meadows*, 5 East. 463, 2 Smith 28, 7 Rev. Rep. 742, 102 Eng. Repr. 1148; *Roberts v. Camden*, 9 East. 93, 9 Rev. Rep. 513, 103 Eng. Repr. 508.

to the pleader,³ on the theory that every person is presumed to state his cause as favorably to himself as it is possible for him to state it.⁴ This rule is subject to the qualification, however, expressed in the well-known maxim, *ut res magis valeat quam pereat*⁵—that the thing, or subject-matter, may rather have effect than be destroyed.⁶ While this maxim is, properly speaking, expressive of the rule as to the one great object of courts in construing contracts⁷ and wills, it is applicable to the construction of pleadings, also; so that where a word or phrase made use of by the pleader is capable of different meanings, that meaning shall be taken which will support the pleading, and not that one which will defeat it.⁸ The reason for this is the fact that, in their general nature, the rules applicable to the construction

³ See, post, § 456.

⁴ Id. See 1 Chitty on Pleading (16th Am. ed.), p. 261.

⁵ Part of one of oldest maxims of the common law, the full maxim reading: *Benigne faciendæ sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat quam pereat*—liberally rendered reads: Interpretations, or constructions, of written instruments are to be made liberally, on account of the simplicity of the laity, or common people, in order that the thing, or subject-matter, may rather have effect than be destroyed, or perish,—that is, become void.

Lord Coke made up this maxim from Bracton's text. The closing words in Bracton, at fol. 95b, are: "*benignæ enim faciendæ sunt interpretationes, ut res magis valeat quam pereat.*" The words "*propter simplicitatem laicorum,*" Lord Coke took from the preceding sentence, and the preceding clause of the

same sentence, in which Bracton observes that grants of advowsons by laymen should not be invalidated on account of the incorrect language of the instrument,—his exact words being, "*propter incongruam dictionem donationis,*"—but should be established by a benign interpretation, or construction—*propter simplicitatem.*

Antiquity of the rule is shown by Bracton's remark in the sentence last quoted from—*et sic fit interpretatio ab antiquis*, and so in this manner the interpretation handed down from antiquity.—Bracton, fol. 95a, 95b.

⁶ 1 Chitty on Pleading (16th Am. ed.), p. 261; Cameron, Town of, v. Hicks, 65 W. Va. 484, 487, 17 Ann. Cas. 926, 64 S. E. 832; Cerauto v. Trimboli, 63 W. Va. 340, 60 S. E. 138.

⁷ See Hall v. Newcomb, 3 Hill (N. Y.) 233, 235.

⁸ 1 Chitty on Pleading (16th Am. ed.), p. 261.

and interpretation of pleadings, are the same as those regulating the construction and interpretation of any written instrument.⁹

§ 755. ——— ILLUSTRATIONS OF MEANING OF WORDS AND PHRASES. Some illustrations of the meaning of words and phrases as used in pleadings, without making any attempt at an exhaustive collection, may serve to show concrete applications of the general fundamental rules of construction and interpretation discussed in the preceding section: *Acceptance* implies due acceptance;¹ and an allegation that certain drafts were accepted by a corporation, by the treasurer thereof, includes an averment that the treasurer had authority to so accept.² The word comprehends both mental assent³ and physical receipt,⁴ in other relations. *Agreed*, in a pleading, has the technical meaning of, and is synonymous with, “contracted,”⁵ or “covenanted”;⁶ and an allegation that a party agreed to do a specified thing, it must be taken to mean that he agreed to do it in a valid and legal manner,—e. g., where a writing would be necessary to constitute a valid agreement, such allegation will be taken to mean that he agreed in writing.⁷ *Company* has been held to import a corporation rather than a copartnership,⁸ although the term

⁹ *Cameron, Town of, v. Hicks*, 65 W. Va. 484, 17 Ann. Cas. 926, 64 S. E. 832. See *Cerauto v. Trimball*, 63 W. Va. 340, 60 S. E. 138.

See 21 R. C. L. 464, § 30.

¹ *Bank of Lawville v. Edwards*, 11 How. Pr. (N. Y.) 216; *Graham v. Machado*, 13 N. Y. Super. Ct. Rep. (6 Duer) 514.

Price of commercial paper which may pass into the hands of an innocent holder, is also imported by the term.—See *Russell v. Falls Mfg. Co.*, 106 Wis. 329, 82 N. W. 134.

² *Partridge v. Badger*, 25 Barb. (N. Y.) 146.

³ Act of the will essential to an acceptance; it is not every receipt of a thing that is an acceptance thereof.—*Hardman v. Bellhouse*, 9 Mees. & W. 596, 600.

⁴ *Hill Co., Geo. M., In re*, 59 C. C. A. 354, 123 Fed. 866.

⁵ *McKisick v. McKisick*, 19 Tenn. (1 Meigs) 427, 433.

⁶ *Randel v. Chesapeake & D. Canal*, 1 Harr. (Del.) 151, 172.

⁷ *Jenkinson v. Vermillion, City of*, 3 S. D. 238, 52 N. W. 1066.

⁸ ARK.—*Van Horne v. State*, 5 Ark. (5 Pike) 349, 352. GA.—*Mattox v. State*, 115 Ga. 212, 41 S. E. 709. ILL.—*Goddard v. Chicago &*

“company” no longer applies exclusively to corporations.⁹ *Continuance of ownership*¹⁰ will be presumed where the allegation states ownership on a certain day.¹¹ *Continued and uninterrupted use* of land alleged, to raise claim to right of possession by adverse possession, means a use not interrupted by the act of the owner of the land or by a voluntary abandonment on the part of the claimant.¹² *Conversion* implies wrongful conversion.¹³ *Death* means murder, in a complaint in slander for charging one with being guilty of the death of a third person.¹⁴ *Delivery*, allegation of making of a written instrument, implied.¹⁵ *Entry* on land means lawful entry.¹⁶ *Dwelling-*

N. W. R. Co., 202 Ill. 362, 66 N. E. 1066. MINN.—Broome v. Galena, D. D. & M. Packet Co., 9 Minn. 239. PA.—Com. v. Reinod, 163 Pa. St. 287, 291, 25 L. R. A. 247, 29 Atl. 896. VA.—Gillett v. American Stove & Hollow Ware Co., 29 Gratt. (Va.) 565; Baltimore & O. R. Co. v. Sherman's Admx., 30 Gratt. (Va.) 602. W. VA.—Douglass v. Kanawha & M. R. Co., 44 W. Va. 267, 28 S. E. 705; State v. Dry Fork R. Co., 50 W. Va. 235, 40 S. E. 447; Snyder v. Philadelphia Co., 54 W. Va. 149, 102 Am. St. Rep. 941, 1 Ann. Cas. 225, 63 L. R. A. 896, 46 S. E. 366; State v. Hotel McCreery Co., 68 W. Va. 130, Ann. Cas. 1912A, 966, 69 S. E. 472. ENG.—Woolf v. City Steamboat Co., 7 Man. G. & S. (7 C. B.) 103, 62 Eng. C. L. 103.

See note Ann. Cas. 1912A, 969.

“Company” and “corporation” are usually used as interchangeable terms.—Goddard v. Chicago & N. W. R. Co., 202 Ill. 362, 66 N. E. 1066.

⁹ Bradley Fertilizer Co. v. South Pub. Co., 4 Misc. (N. Y.) 172, 23 N. Y. Supp. 675; Leader Printing

Co. v. Lowry, 9 Okla. 89, 59 Pac. 242; State v. Mead, 27 Vt. 722, 724.

Does not necessarily mean corporation, either in common speech or at law.—Bradley Fertilizer Co. v. South Pub. Co., 4 Misc. (N. Y.) 172, 23 N. Y. Supp. 675.

Railroad company held not to be equivalent to “railroad corporation,” as might mean either an association or a corporation.—State v. Mead, 27 Vt. 722, 724.

¹⁰ As to ownership, see footnote 35, this section.

¹¹ Von Rensselaer v. Bonesteel, 24 Barb. (N. Y.) 365.

¹² Funkboner v. Corder, 127 Ind. 164, 26 N. E. 766.

¹³ Young v. Cooper, 6 Ex. 62, 20 Law Jour. (Ex.) 136.

¹⁴ Pelton v. Ward, 3 Cal. (N. Y.) 73, 2 Am. Dec. 251.

¹⁵ Prindle v. Caruthers, 15 N. Y. 425, 12 N. Y. Super. Ct. Rep. (5 Duer) 670, note, reversing 10 How. Pr. 33; Peets v. Pratt, 6 Barb. (N. Y.) 662; La Fayette Ins. Co. v. Rogers, 30 Barb. (N. Y.) 491.

See, also, footnote 19, this section.

¹⁶ Turner v. McCarthy, 4 E. D. Smith (N. Y.), 248.

house embraces the land on which it stands as necessarily incident to its use.¹⁷ *Indorsed* imports duly indorsed,¹⁸ and includes delivery.¹⁹ *Indorsement* imports a writing,²⁰ and a transfer by writing.²¹ *Lease in writing* implies agreement for quiet enjoyment.²² *Lie* charging person with having sworn to, “for which you stand indicted,” in a complaint for slander, imports a charge of perjury.²³ *Near*, as used in a pleading, is a relative term,²⁴ and its meaning is to be determined by reference to the subject-matter,²⁵ implying either close to or no great distance from,²⁶ and has been said to be unobjectionable in a pleading,²⁷ although the contrary is also held.²⁸ *Negligence* is not a mere technical term, but an English word of well-known popular meaning,²⁹ including both gross and ordi-

¹⁷ *Endsley v. State*, 76 Ind. 467; *Hawkins v. Wilson*, 1 W. Va. 117; *State ex rel. Post v. Clarksburg School District Board*, 71 W. Va. 52, Ann. Cas. 1914B, 1238, 76 S. E. 127.

See note Ann. Cas. 1914B, 1239.

¹⁸ *Mechanics' Bank Assoc. v. Spring Valley Shot & Lead Co.*, 25 Barb. (N. Y.) 419, reversing 13 How. Pr. 227; *Bank of Geneva v. Gulick*, 8 How. Pr. (N. Y.) 51; *Price v. McClave*, 13 N. Y. Super. Ct. Rep. (6 Duer) 544, affirming 12 N. Y. Super. Ct. Rep. (5 Duer) 670, 13 Abb. Pr. 253.

¹⁹ *Bank of Lowville v. Edwards*, 11 How. Pr. (N. Y.) 216.

See, also, footnote 15, this section.

²⁰ *Huston v. Fatka*, 30 Ind. App. 693, 66 N. E. 74.

²¹ *Keller v. Williams*, 49 Ind. 504.

²² *Tone v. Brace*, 11 Pal. Ch. (N. Y.) 566; *New York, City of, v. Mable*, 13 N. Y. 151, 64 Am. Dec. 538; *Vernam v. Smith*, 15 N. Y. 332.

²³ *Pelton v. Ward*, 3 Cal. (N. Y.) 73, 2 Am. Dec. 251. See, however, *Hopkins v. Beadle*, 1 Cal. (N. Y.) 347, 1 Am. Dec. 191.

²⁴ *Haughawout v. Percival*, 161 Cal. 491, Ann. Cas. 1913D, 115, 119 Pac. 649; *Barrett v. Schuyler County Court*, 44 Mo. 197, 202.

See note Ann. Cas. 1913D, 117.

²⁵ *Haughawout v. Percival*, 161 Cal. 491, Ann. Cas. 1913D, 115, 119 Pac. 649.

²⁶ *Ward v. Wilmington & W. R. Co.*, 109 N. C. 358, 13 S. E. 926; *Mains v. State*, 50 Tenn. (3 Helsk.) 315.

²⁷ *Hyman v. Newell*, 7 Colo. App. 81, 42 Pac. 1016; *Proctor v. Andover*, 42 N. H. 348; *Warner v. Callender*, 20 Ohio St. 190.

²⁸ *Indianapolis & V. R. Co. v. Newson*, 54 Ind. 121; *Holcomb v. Danby*, 51 Vt. 428; *Kellogg v. Northampton*, 70 Mass. (4 Gray) 65.

²⁹ *Edelmann v. St. Louis Transfer Co.*, 3 Mo. App. 503, 507.

nary negligence;³⁰ and in legal acceptance imports either acts of commission or of omission.³¹ *No award* means no valid award.³² *No memorial* imports no valid memorial.³³ *Overpayment* means an overpayment in money.³⁴ *Ownership* imports absolute property-right in a thing.³⁵ *Owes* signifies "owes and detains," in complaint against officer for public moneys.³⁶ *Possession* means a detention or enjoyment of a thing which a man holds or exercises by himself or another, who keeps or exercises it in his name,³⁷ and imports legal possession.³⁸ *Signed* means made, when applied to a note or other negotiable instrument.³⁹ *Signed and sealed*, affixed at the end of an instrument and followed by L. S., equivalent to "witness my hand and seal."⁴⁰ *Subscription to stock* of a corporation, implies the ownership of the designated number of shares of

³⁰ *Natton v. Western R. Corp.*, 15 N. Y. 444, 450, 69 Am. Dec. 623, affirming 10 How. Pr. 97; *Edgerton v. New York & H. R. Co.*, 35 Barb. (N. Y.) 389; affirmed, 39 N. Y. 227, 6 Transc. App. 248.

³¹ ALA.—*Grant v. Moseley*, 29 Ala. 302, 305. IND.—*Citizens' Street R. Co. v. Merl*, 26 Ind. App. 284, 59 N. E. 491. MISS.—*Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.*, 70 Miss. 119, 12 So. 156. OHIO.—*Johnson v. State*, 66 Ohio St. 59, 90 Am. St. Rep. 564, 61 L. R. A. 277, 63 N. E. 607. VT.—*Houston v. Brush*, 66 Vt. 331, 29 Atl. 380. FED.—*Elchel v. Sawyer*, 44 Fed. 845, 847.

³² *Dusser v. Stansfield*, 4 Mees. & W. 822.

³³ *Hicks v. Cracknell*, 3 Mees. & W. 77.

³⁴ *Mann v. Morewood*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 557.

³⁵ See *Converse v. Kellogg*, 7 Barb. (N. Y.) 590, 597; *Hill v. Cumberland Valley Mut. Protection Co.*, 59 Pa. St. 474, 477.

³⁶ *Cameron, Town of, v. Hicks*, 65 W. Va. 484, 488, 17 Ann. Cas. 926, 64 S. E. 832.

³⁷ ARIZ.—*Tidewell v. Chiricahua Cattle Co.*, 5 Ariz. 352, 53 Pac. 192. CAL.—*Sunol v. Hepburn*, 1 Cal. 254, 265. N. Y.—*Redfield v. Utica & S. R. Co.*, 25 Barb. 54. OKLA.—*Casey v. Mason*, 8 Okla. 655, 59 Pac. 252. TEX.—*Evans v. Foster*, 79 Tex. 48, 15 S. W. 170.

³⁸ *Guynn v. Jones*, 12 Ind. 486; *Butt v. Clark*, 23 Ind. 548; *Kerslake v. Cummings*, 180 Mass. 65, 61 N. E. 760; *Utah Nat. Bank v. Beardsley*, 10 Utah 404, 37 Pac. 586; *Six Hundred Fifty-one Cases of Tea v. United States*, 1 Paine 499, Fed. Cas. No. 12916.

³⁹ *Bank of Geneva v. Gulick*, 8 How. Pr. (N. Y.) 51; *Price v. McClane*, 13 N. Y. Super. Ct. Rep. (6 Duer) 544, affirming 12 N. Y. Super. Ct. Rep. (5 Duer) 670, 3 Abb. Pr. 253.

⁴⁰ *Humphries v. Nix*, 77 Ga. 98.

stock, and that the party is entitled to those shares.⁴¹ *Taking* imports an unlawful taking.⁴² *Unlawful, wrongful*, express a mere conclusion of law,⁴³ and when used in connection with issuable facts, although they do not vitiate a pleading, they are surplusage,⁴⁴ and had better be omitted.⁴⁵ *Writing obligatory* is a technical phrase which implies a written instrument under seal,⁴⁶ as a bond,⁴⁷ deed,⁴⁸ and the like, and the term has not come into common use with a significance different from its technical meaning;⁴⁹ it is never necessary to allege sealing and delivery.⁵⁰

§ 756. — AMBIGUOUS WORDS AND PHRASES. We have already seen that ambiguous words and phrases, or when a pleading, taken as a whole, is ambiguous and uncertain in its allegations,—that is, words and phrases, or a pleading, susceptible of two or more meanings, either of which can rationally be given to them or it,—that meaning is to be taken which is most strongly against the interest of the pleader;¹ in other words, in such cases there is to be a strict construction against interest.² The reason for

⁴¹ *Oswego & Syracuse Plank Road Co. v. Rust*, 5 How. Pr. (N. Y.) 390.

⁴² *Childs v. Hart*, 7 Barb. (N. Y.) 372.

⁴³ *Payne v. Treadwell*, 16 Cal. 220.

See, ante, §§ 715, 742, footnote 52.

⁴⁴ As to surplusage, see, ante, § 128.

⁴⁵ *Halleck v. Mixer*, 16 Cal. 575; *Miles v. McDermott*, 31 Cal. 271.

⁴⁶ N. M.—*Luna v. Mohr*, 3 N. M. 56, 1 Pac. 860. N. Y.—*Jackson v. Perkins*, 2 Wend. (N. Y.) 308, 317. OHIO—*Stall v. Wilcox*, 2 Ohio St. 569, 573. TENN.—*Watson v. Hoge*, 15 Tenn. (7 Yerg.) 344, 351. VT.—*Denton v. Adams*, 6 Vt. 40, 42; *Ide v. Passumpsic & C. R. Co.*, 32 Vt.

297. FED.—*Clark v. Phillips*, Hempst. 294, Fed. Cas. No. 2831a.

Simple contracts never included within meaning of phrase, although they are in writing.—*Luna v. Mohr*, 3 N. M. 56, 1 Pac. 860.

⁴⁷ *Luna v. Mohr*, 3 N. M. 56, 1 Pac. 860; *Denton v. Adams*, 6 Vt. 40, 42.

⁴⁸ *Egan v. Horrigan*, 96 Me. 46, 51 Atl. 246; *Jackson v. Perkins*, 2 Wend. (N. Y.) 308, 317; *Ide v. Passumpsic & C. R. Co.*, 32 Vt. 297.

⁴⁹ *Watson v. Hoge*, 15 Tenn. (7 Yerg.) 344, 351.

⁵⁰ *Egan v. Horrigan*, 96 Me. 46, 51 Atl. 246.

¹ See, ante, § 754, footnotes 3 and 4 and text going therewith.

² *Chipman v. Emeric*, 5 Cal. 49,

this rule, as above noted, is the fact that the pleader is presumed to state his cause, from his side, as favorably as the facts will justify or permit.³ Thus, where a party avers a fact directly in one part of his pleading, and in another part of the same pleading the same fact is directly denied, on the trial, that averment which bears most strongly against the interest of the party will be adopted by the court.⁴ The same rule applies in those cases in which the pleading is silent as to things which must have occurred in connection with, or in relation to, the subject-matter of the action, as applies in cases of affirmative ambiguity;⁵ the presumption being indulged that the omitted facts were not stated in the allegations of the pleading because they were against the pleader's interest. No intendments can be indulged in aid of a pleading affirmatively or negatively ambiguous or uncertain.⁶ Time being an element in the cause, and the defendant's answer sets out the day and the month, but omits the year, the court will presume that the allegation relates to the year mentioned in the plaintiff's complaint;⁷ and the same presumption will be indulged in

63 Am. Dec. 80; Dickinson v. Maguire, 9 Cal. 46; Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725; Herrington v. Santa Clara County, 44 Cal. 496; Johnson v. Moss, 45 Cal. 415; Triscony v. Orr, 49 Cal. 612; Rogers v. Shannon, 52 Cal. 99; Collins v. Townsend, 58 Cal. 608; Fowler v. Sutherland, 68 Cal. 414, 417, 9 Pac. 674; Hays v. Stelger, 76 Cal. 555, 18 Pac. 670; Potter v. Fowzer, 78 Cal. 493, 496, 21 Pac. 118; Glide v. Dwyer, 83 Cal. 477, 479, 23 Pac. 706; Heller v. Dwyerville Mfg. Co., 116 Cal. 127, 133, 47 Pac. 1016; California Nav. Co. v. Union Transp. Co., 122 Cal. 641, 55 Pac. 591.

³ Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725; Johnson v. Moss, 45 Cal. 515; Rogers v. Shannon, 52 Cal. 99; Callahan v. Laughron, 102 Cal. 476, 36 Pac. 385; Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 Pac. 395; Schaadt v. Mutual Life Ins. Co., 2 Cal. App. 715, 84 Pac. 249

See, also, post, § 757, footnote 3.

⁴ Bell v. Brown, 22 Cal. 671.

⁵ Woodroof v. Howes, 88 Cal. 184, 194, 26 Pac. 111.

⁶ Evinger v. Moran, 14 Cal. App. 328, 112 Pac. 68.

⁷ Hubner v. Townsend, 8 Abb. Pr. N. S. (N. Y.) 234.

those cases in which the defendant's allegations as to time are otherwise ambiguous or uncertain.⁸

Substantial justice between the parties is the fundamental rule governing in the construction or interpretation of pleadings, by the code provision above set out;⁹ and this primary rule is never to be lost sight of in construing doubtful or ambiguous pleading;¹⁰ neither is that other fundamental rule requiring the construction or interpretation to be such as to support the pleading,¹¹ where such a construction is practicable.

§ 757. — AVERMENTS IN PLEADING CONSIDERED, ONLY. In the construction or interpretation of a pleading, before judgment, which is ambiguous or uncertain,—if a pleading is frank, full and plain it requires no construction or interpretation, in the technical sense,—no indulgence of intendments are permitted,¹ although the pleader is to be given the benefit of every allegation made or reasonably implied.² The court is confined strictly to the allegations made in the pleading under consideration, or that may reasonably be implied to be made therein, and must view it as a whole;³ nothing is permitted to be assumed in favor of the pleader which he has not properly set out, or attempted to set out, in his pleading; the presumption

⁸ McCormick v. Blosson, 40 Iowa 256; Wheeler v. Heermans, 5 Sandf. Ch. (N. Y.) 597; Prindle v. Caruthers, 15 N. Y. 425, 12 N. Y. Super. Ct. Rep. (5 Duer) 670, note, reversing 10 How. Pr. 33; DeGrove v. Metropolitan Ins. Co., 61 N. Y. 594, 19 Am. Rep. 305; Legrand v. Manhattan Mercantile Assoc., 80 N. Y. 638; Rice v. O'Connor, 10 Abb. Pr. (N. Y.) 362; Townshend v. Norris, 7 Hun (N. Y.) 239; Burns v. O'Neill, 10 Hun (N. Y.) 394.

⁹ See, ante, § 751, footnote 2.

¹⁰ Pavlovich v. Pavlovich, 22 Cal. App. 500, 135 Pac. 303.

¹¹ See, ante, § 754, footnotes 5-9 and text going therewith.

¹ See, ante, § 756, footnote 6, and text; also footnote 3, this section.

² See Cogswell v. Bull, 39 Cal. 320; Smith v. Buttner, 90 Cal. 95, 27 Pac. 29; Chamberlin v. Blair, 58 Ill. 385; Witham v. Blood, 124 Iowa 695, 100 N. W. 558; Stone v. Young, 4 Kan. 17; Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. 869.

³ See, post, § 759.

being that the pleader has pleaded everything he could plead to his advantage, and that he has made the best possible presentation of his cause that the facts will permit.⁴ The court can not include or incorporate anything which the pleader has omitted by accident or design.⁵ Thus, a complaint in an action for damages for a personal injury alleged to have been sustained because of or through the negligence of the defendant, which fails to allege that the accident complained of occurred through or because of any latent insecurity of the structure which caused the injuries, it will be presumed that the accident arose from a patent defect, and that the pleader failed to make a more specific statement because such a statement would have weakened his cause.⁶ Again, in an action

4 See, ante, § 756, footnote 3. See, also: ALA.—*Rapier v. Gulf City Paper Co.*, 64 Ala. 330. CAL.—*Hoag v. Warden*, 37 Cal. 522; *Cogswell v. Bull*, 39 Cal. 320; *Harris v. Hellegass*, 54 Cal. 463; *Colens v. Townsend*, 58 Cal. 608; *Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29; *Burkett v. Griffith*, 90 Cal. 532, 25 Am. St. Rep. 151, 13 L. R. A. 707, 27 Pac. 527. COLO.—*Supply Ditch Co. v. Elliott*, 10 Colo. 327, 15 Pac. 691. ILL.—*Chamberlin v. Blair*, 58 Ill. 385. IOWA—*Witham v. Blood*, 124 Iowa 695, 100 N. W. 558. KAN.—*Stone v. Young*, 4 Kan. 11; *Beadle v. Kansas City, Ft. S. & M. R. Co.*, 48 Kan. 379, 29 Pac. 696. KY.—*Stevenson v. Flournoy*, 89 Ky. 561, 13 S. W. 210. MINN.—*Coolbaugh v. Roemer*, 30 Minn. 424, 15 N. W. 869. N. Y.—*Cruger v. Hudson River R. Co.*, 12 N. Y. 190, 196; *Emery v. Pease*, 20 N. Y. 62; *Wright v. Delafield*, 25 N. Y. 266, reversing 23 Barb. 498; *Tooker v. Arnoux*, 76 N. Y. 397; *Burrall v. Bowen*, 21 How. Pr. (N. Y.) 378; *Fairbanks v. Bloom-*

field, 9 N. Y. Super. Ct. Rep. (2 Duer) 349.

Account stated pleaded by averring that the plaintiff made a statement and delivered it to the defendant, who made no objection thereto, does not necessarily establish the conclusion necessary to sustain an action upon an account stated; no intendment can be indulged; further facts,—e. g., time of delivery, and the lapse of a reasonable time,—should be set out.—*Emery v. Pease*, 20 N. Y. 62.

⁵ *Chamberlin v. Blair*, 58 Ill. 385.

⁶ *Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29.

General terms sufficient to charge negligence; that is, what was done being stated, it is sufficient to say that it was negligently done, without stating the particular omission which rendered the act negligent; but it must appear from the facts averred that the negligence complained of caused or contributed to the injury.—*Smith v. Buttner*, 90 Cal. 95, 99, 27 Pac. 29.

against a sheriff for failure to return an execution within the time allowed by law, a complaint which alleges the receipt of the execution by the sheriff; that he collected the money thereunder; and that he failed to make a return on the execution within the time prescribed by law, but which fails to allege that the sheriff failed to pay to the plaintiff the money made on the execution, the court can not assume, even in case the allegations of the complaint are not denied, in the absence of an allegation on the point, that the money was not paid over by the sheriff to the plaintiff.⁷

§ 758. — TECHNICALITIES AND TECHNICAL OBJECTIONS. It has already been noted that under the reformed procedure all the forms of pleading theretofore existing are abolished,¹ and all artificial distinctions and fictions done away with.² With the passing of these all the “maze of technicalities,” which formerly prevailed, has ceased to have importance and becomes negligible. Consequently in those cases in which the objection urged against a pleading is of a purely technical character, it will not be entertained further than is necessary for the due and orderly administration of justice under the procedural codes, governed by the fundamental rule requiring the allegations in the pleadings to be so constructed as to promote substantial justice between the parties.³ Thus, where a conversion of property is charged, an objection to the sufficiency of the complaint because there is no formal and technical allegation that the act charged was unlawful, will not be entertained, because under the liberal rule of construction the element of unlawfulness is imported in the general charge of conversion.⁴ The same is true regarding an allegation of the delivery of a writ-

⁷ Hoag v. Warden, 37 Cal. 522;
Witham v. Blood, 124 Iowa 695, 100
N. W. 558.

¹ See, ante, § 29.

² See, ante, § 30.

³ See, ante, § 756, footnotes 9-11.

⁴ See, ante, § 755, footnote 13.

ten instrument,⁵ or of an entry upon land,⁶ the legality of the act being implied, need not be specially pleaded. Likewise an allegation that an instrument was indorsed, carries with it the implied averment that it was duly⁷ and legally⁸ indorsed, and also imports a writing⁹ and a delivery¹⁰. Hence a pleading which fails to set forth these implied averments, mere technical allegations, is to be construed as being sufficient, if otherwise unobjectionable; because a pleading which attempts to set out a cause of action or defense, which does so in mere general averments, and is simply defective in the formal statement of such cause of action or defense, rather than in the absolute lack thereof, the pleading will be sustained,¹¹ under the liberal rule of construction of the procedural codes requiring that pleadings shall be so construed as to uphold them,¹² where that is practicable, regardless of any mere technical defects and objections,¹³ under a fair and reasonable construction;¹⁴ but, as Mr. Justice Okey has well said, the courts are not required to construe every equivocal word or phrase most strongly in favor of the pleader,¹⁵ in order to accomplish this end.

⁵ Id., footnote 15.

⁶ Id., footnote 16.

⁷ Id., footnote 18.

⁸ *Mechanics' Banking Assoc. v. Spring Valley Shot & Lead Co.*, 25 Barb. (N. Y.) 419, reversing 13 How. Pr. 227.

⁹ See, ante, § 755, footnote 20.

¹⁰ Id., footnote 19.

¹¹ See *Blasdel v. Williams*, 9 Nev. 161.

¹² See, ante, § 754, footnotes 5-8 and text.

¹³ See: IND.—*Dillman v. Crooks*, 91 Ind. 158; *Watson v. Crowson*, 93 Ind. 220; *Wells v. Rhodes*, 114 Ind. 467, 16 N. E. 830. KAN.—*Wilkins v. Moore*, 20 Kan. 538. MICH.—*Hanselman v. Carstens*, 60 Mich. 118, 27 N. W. 18. N. Y.—*Corning*

v. Corning, 6 N. Y. 97, affirming 1 N. Y. Code Rep. N. S. 351; *White v. Spencer*, 14 N. Y. 247; *Keteltas v. Myers*, 19 N. Y. 231, reversing 3 E. D. Smith 83, 1 Abb. Pr. 403; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253, affirming 47 Barb. 439; *Peets v. Pratt*, 6 Barb. 662. OHIO—*Crooks v. Finney*, 39 Ohio St. 57; *Robinson v. Greenville, City of*, 42 Ohio St. 625, 51 Am. Rep. 857. WIS.—*Hubbard v. Williamstown, Town of*, 61 Wis. 397, 21 N. W. 295.

¹⁴ *Robinson v. Greenville, City of*, 42 Ohio St. 625, 51 Am. Rep. 857; *McCurdy v. Baughman*, 43 Ohio St. 78, 1 N. E. 93.

¹⁵ *Robinson v. Greenville, City of*, 42 Ohio St. 625, 51 Am. Rep. 857; *Brady v. Evans*, 24 C. C. A. 236, 47

Substantial averments omitted, such omission can not be disregarded by the courts,¹⁶ since they can not assume anything in favor of a party which he has not set out in his pleadings, or attempted to set out.¹⁷ The liberal rule to promote substantial justice between the parties, means substantial legal justice, to be ascertained and determined by fixed rules and positive statutes.¹⁸

§ 759. — ENTIRE PLEADING IS TO BE CONSIDERED. In construing a pleading, one of the general rules is that the court must take into consideration the entire pleading,¹ and so construe it as to make all its parts harmonize, if possible, with each other.² We have already seen that, in the construction of a pleading, no intendments can be indulged in favor of a pleading affirmatively or negatively ambiguous or uncertain;³ neither can anything extrinsic be considered which would impair the full force and effect of what the pleader sets forth; the consideration must be confined strictly to the general tenor and scope of the pleading;⁴ a paragraph can not be omitted

U. S. App. 416, 78 Fed. 558; Humboldt Min. Co. v. American Mfg. Min. & Mill. Co., 10 C. C. A. 415, 22 U. S. App. 334, 62 Fed. 356.

¹⁶ Koenig v. Nott, 2 Hilt. (N. Y.) 323, 8 Abb. Pr. 384; Spear v. Downing, 34 Barb. (N. Y.) 522, 12 Abb. Pr. 437, 22 How. Pr. 30.

¹⁷ Cruger v. Hudson River R. Co., 12 N. Y. 190.

Character of pleading to be determined by its averments, not by name which the pleader gives to it.—Indianapolis School Commrs. v. Center Township, 143 Ind. 391, 42 N. E. 808.

¹⁸ Stevens v. Ross, 1 Cal. 94.

¹ Alemany v. Petaluma, City of, 38 Cal. 553; Farish v. Coon, 40 Cal. 33; Hatch v. Peet, 23 Barb. (N. Y.) 575; Beach v. Berdell, 9 N. Y. Super. Ct. Rep. (2 Duer) 327.

¹ Code Pl. and Pr.—63

² Ryle v. Harrington, 4 Abb. Pr. (N. Y.) 241, 14 How. Pr. 59.

³ See, ante, § 756, footnote 6.

Seals affixed without consent of defendant alleged, the plea, to be sufficient, must further allege that they were affixed with the knowledge, or by the direction, of the plaintiff.—United States v. Linn, 42 U. S. (1 How.) 104, 11 L. Ed. 64.

⁴ CAL.—Alemany v. Petaluma, City of, 38 Cal. 553; Glide v. Dwyer, 83 Cal. 478, 23 Pac. 706; Bates v. Babcock, 95 Cal. 479, 29 Am. St. Rep. 133, 16 L. R. A. 745, 30 Pac. 605. IND.—Neidefer v. Chastain, 71 Ind. 363, 36 Am. Rep. 198; Reynolds v. Copeland, 71 Ind. 422; Johnston v. Griest, 85 Ind. 503; Mascall v. Tully, 91 Ind. 96; Western Union Tel. Co. v. Young, 93 Ind. 118; Western Union Tel.

or a sentence isolated⁵ from its context to give effect to an independent averment.⁶ We have already seen⁷ that, in case of an ambiguous or uncertain pleading, the averment which bears most strongly against the interests of the pleader is to be adopted;⁸ but the liberal provisions of the statute, in facilitating amendments to pleadings, have somewhat modified the maxim that pleadings should be construed most strongly against the pleader, as laid

Co. v. Reed, 96 Ind. 195; Cottrell v. Aetna Life Ins. Co., 97 Ind. 311; North Vernon, City of, v. Voegler, 103 Ind. 314, 2 N. E. 821; Clare v. McIntire, 120 Ind. 262, 22 N. E. 128. IOWA—Pharo v. Johnson, 15 Iowa 560. KAN.—Wiley v. Keokuk, 6 Kan. 94; Butler v. Kaneback, 8 Kan. 669; Gilchrist v. Schmidling, 12 Kan. 269. N. Y.—Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551; Macomber v. Granite Ins. Co., 15 N. Y. 495; Calvo v. Davies, 73 N. Y. 211, 29 Am. Rep. 130, affirming 8 Hun. 222; Gildersleeve v. Landon, 73 N. Y. 609; Ryle v. Harrington, 4 Abb. Pr. 421, 14 How. Pr. 59; Goodyear v. De la Vergne, 10 Hun 537; Whitney v. Ticonderoga, 53 Hun 214, 6 N. Y. Supp. 844; affirmed, 127 N. Y. 40, 27 N. E. 403; Farrell v. Amberg, 8 Misc. 220, 23 N. Y. Civ. Proc. Rep. 434, 28 N. Y. Supp. 564; affirmed, 151 N. Y. 670, 46 N. E. 1146; Clare v. National City Bank, 35 N. Y. Super. Ct. Rep. (3 Jones & S.) 261, 14 Abb. Pr. N. S. 326; Tovey v. Culver, 54 N. Y. Super. Ct. Rep. (22 Jones & S.) 404. OHIO—Trimble v. Doty, 16 Ohio St. 119; Crooks v. Finney, 39 Ohio St. 57; Robinson v. Greenville, City of, 42 Ohio St. 625, 51 Am. Rep. 857. UTAH—Houtz v. Gibson, 1 Utah 173; Saunders v. Sioux City Nursery, 6 Utah 431, 24 Pac. 532.

WASH.—Chambers v. Hoover, 3 Wash. Tr. 107, 13 Pac. 466.

See, also, ante, § 758, footnote 15 and text.

Fraud in sale of patent-right charged, an allegation showing the falsity of representations, which falls to aid such allegation by setting out and showing an injury flowing or resulting from the falsity of the representations.—Neidefer v. Chastain, 71 Ind. 363, 36 Am. Rep. 198.

Unnecessary statements to be disregarded as surplusage, where the pleading, as a whole, states a good cause of action or defense.—Houtz v. Gibson, 1 Utah 173.

As to effect of pleading surplusage on unnecessary statements, see, ante, § 728.

⁵ Alemany v. Petaluma, City of, 38 Cal. 553.

Eliminating paragraph and giving effect to the pleading as an answer, when it appears from the context, and other parts of the pleading, that the denial was intended to be hypothetical, is not permissible.—Alemany v. Petaluma, City of, 38 Cal. 553.

As to hypothetical pleading, see, ante, § 737.

⁶ Farish v. Coon, 40 Cal. 33.

⁷ See, ante, § 756.

⁸ Bell v. Brown, 22 Cal. 671; Trisconny v. Orr, 49 Cal. 612.

down by standard authors; and which, subject to such modification, has been declared as still the rule of construction.⁹ We have already observed¹⁰ that every pleader is presumed to have stated his case as favorably to himself as possible;¹¹ yet the language of a pleading is to have a reasonable intendment and construction.¹² Consequently when a pleading has on its face two intendments, it ought to be construed by this rule,—most strongly against the person pleading it;¹³ but where an expression is capable of different meanings, that meaning should be taken which will support the allegation, and not the one which would defeat it.¹⁴ When a word has two meanings in law differing in degree merely, it will be understood in its larger sense, unless it appears to be used in its narrower sense.¹⁵ We have already seen¹⁶ that doubtful or ambiguous language is to be construed most strongly against the pleader,¹⁷ unless con-

⁹ *Dickinson v. Maguire*, 9 Cal. 46; *Moore v. Besse*, 30 Cal. 570; *Kingsley v. Bill*, 9 Mass. 198; *Doane v. Badger*, 12 Mass. 69; *Star Steamship Co. v. Mitchell*, 1 Abb. Pr. N. S. (N. Y.) 396.

¹⁰ See, ante, § 756, footnote 3.

¹¹ See, also, 1 Chitty on Pleading (16th Am. ed.), p. 241; *Co. Litt.* 303; *Fuller v. Hampton*, 5 Conn. 422.

Material fact omitted, the pleading must be construed as implying that the fact does not exist, and for that reason could not be averred.—*Callaghan v. Loughran*, 102 Cal. 476, 38 Pac. 835.

¹² 1 Chitty on Pleading (16 Am. ed.), p. 237; *Hastings v. Wood*, 13 Johns. (N. Y.) 482.

¹³ *United States v. Linn*, 42 U. S. (1 How.) 104, 11 L. Ed. 64; *Sideway v. Missouri Land & Live-stock Co.*, 116 Fed. 387.

¹⁴ 1 Chitty on Pleading (16th

Am. ed.), p. 237. See, also, *Pender v. Dicken*, 27 Miss. 252; *King, The, v. Stephens*, 5 East 244, 102 Eng. Repr. 1063; *Hudson v. Mucklow*, 12 East. 273, 279, 104 Eng. Repr. 107; *Gage v. Acton*, 1 Salk. 325, 91 Eng. Repr. 288; *Vernon v. Keyes*, 4 Taunt. 487, 492, 128 Eng. Repr. 419, 421.

¹⁵ *Miller v. Miller*, 33 Cal. 353; *Henneger v. Lornas*, 145 Ind. 287, 32 L. R. A. 848, 44 N. E. 462.

¹⁶ See, ante, § 756.

¹⁷ 1 Chitty on Pleading (16th Am. ed.), p. 987; *Stephen on Pleading* (Williston's ed.), p. 415. See, also: ARK.—*Lawson v. State to use of Ashley*, 10 Ark. 28, 50 Am. Dec. 238. ILL.—*Green v. Covillaud*, 10 Cal. 317, 70 Am. Dec. 725; *Moore v. Besse*, 30 Cal. 570. ILL.—*Groff v. Akenbrandt*, 124 Ill. 51, 7 Am. St. Rep. 342, 15 N. E. 40; *McPhall v. People*, 160 Ill. 77, 52 Am. St. Rep. 306. IND.—*Burrows*

fessed to be ambiguous, with a request on the part of the pleader to be allowed to amend.¹⁸ Where it is doubtful on which the pleader intends to rely, tort or contract, that construction should prevail which is most unfavorable to the pleader.¹⁹ In the case of allegations in the present tense in a verified pleading, they must be deemed as relating to the date of verification.²⁰ If the allegations of a defense are pertinent to the controversy, their sufficiency can only be tested on demurrer or on the trial.²¹

v. Yount, 6 Blackf. 458, 39 Am. Dec. 439. MISS.—Natchez, City of, v. Minor, 17 Miss. (9 Smed. & M.) 544, 48 Am. Dec. 727. N. Y.—Ridder v. Whitlock, 12 How. Pr. 208; Bates v. Rosekrans, 23 How. Pr. 98; affirmed, 37 N. Y. 409, 4 Abb. Pr. N. S. 276, 4 Transc. App. 332.

See, also, notes 3 Am. Dec. 159; 63 Am. Dec. 82.

¹⁸ Chipman v. Emeric, 5 Cal. 49, 63 Am. Dec. 80; Nevada & Sacramento County Canal Co. v. Kidd, 28 Cal. 673; Atlantic & W. P. R. Co. v. Georgia R. & Electric Co., 125 Ga. 798, 800, 54 S. E. 753. See Frost v. Witter, 132 Cal. 421, 425, 84 Am. St. Rep. 53, 64 Pac. 705.

¹⁹ See Rock Island, City of, v. Cuinely, 126 Ill. 408, 18 N. E. 753; Randall v. Van Wagenen, 115 N. Y. 527, 12 Am. St. Rep. 828, 17 N. Y. Civ. Proc. Rep. 403, 22 N. E. 361; Munger v. Hess, 28 Barb. (N. Y.) 75; Ridder v. Whitlock, 12 How. Pr. (N. Y.) 212; Purcell v. Richmond & D. R. Co., 108 N. C. 414, 12 L. R. A. 113, 12 S. E. 954, 956.

In Kansas, in a civil action which may be founded either upon contract or tort, the plaintiff is not required to state upon which he relies as a basis for the action, and generally, if he should make

such a statement and be mistaken, the statement would be immaterial. All that a plaintiff is required to do under the Kansas Code of Civil Procedure (§ 10; Gen. Stats. 1901, § 4438), is to state the facts constituting his cause of action, in ordinary and concise language, without repetition.—Cockrell v. Henderson, 81 Kan. 335, 50 L. R. A. (N. S.) 1, 105 Pac. 443.

In New York, a plaintiff who has set up facts constituting a cause of action on contract, and sustained such allegations by proof on the trial, is not to be nonsuited because he has included in his complaint unnecessary allegations adapted to an action ex delicto.—Conaughty v. Nichols, 42 N. Y. 83.

In North Carolina, the plaintiff may elect whether ambiguous complaint be construed as an action on contract or in tort.—Hood v. Sudderth, 111 N. C. 222, 16 S. E. 397.

²⁰ Wheeler v. Heermans, 3 Sandf. Ch. (N. Y.) 597, 4 Leg. Obs. 382; Rice v. O'Connor, 10 Abb. Pr. (N. Y.) 362.

²¹ Carpenter v. Bell, 24 N. Y. Super. Ct. Rep. (1 Rob.) 711, 19 Abb. Pr. 258.

Separate pleas are to be construed separately, except in those cases in which they are connected by a reference to each other.²² Where a pleading is filed as an amendment to a former pleading, it will not be construed as a substitute for such former pleading unless such an intention is therein expressed; and the original and the amended pleading will be construed together.²³

§ 760. — GENERAL AND SPECIFIC ALLEGATIONS—CLAUSES OF SENTENCE. In the construction of pleadings, a general allegation followed by a specific statement of facts, the specific statement controls the general statement, whether the latter is or is not a mere conclusion of law.¹ But this rule governs in those cases, only, in which

²² *Clements v. Cribbs*, 19 Ala. 241.

²³ *Cooley v. Brown*, 35 Iowa 475; *Montgomery v. Shockey*, 37 Iowa 107; *Kostendader v. Pierce*, 37 Iowa 645; *State v. Finn*, 45 Iowa 148; *Rump v. Schwartz*, 56 Iowa 611, 10 N. W. 99; *Flint v. Gauer*, 66 Iowa 696, 24 N. W. 513; *Burrows v. Frank*, 67 Iowa 502, 25 N. W. 750.

The original and amended complaint together constitute the plaintiff's cause of action. They are to be considered as one pleading.—Beck, C. J., in *Flint v. Gauer*, 66 Iowa 696, 24 N. W. 513.

¹ CAL.—*Haven v. Seeley*, 59 Cal. 494; *Emerson v. Yosemite Gold Min. & Mill. Co.*, 149 Cal. 50, 59, 85 Pac. 122. IND.—*Neidefer v. Chastain*, 71 Ind. 363, 36 Am. Rep. 198; *Reynolds v. Copeland*, 71 Ind. 422; *Richardson v. Snider*, 72 Ind. 425, 37 Am. Rep. 168; *Woolen v. Whiteacre*, 73 Ind. 198; *Stack v. Beach*, 74 Ind. 571, 39 Am. Rep. 113; *Jackson School Township v. Farlow*, 75 Ind. 118; *State v. Wen-*

zel, 77 Ind. 428; *Indianapolis & St. L. R. Co. v. Johnson*, 102 Ind. 354, 26 N. E. 200; *Ivens v. Cincinnati, W. & M. R. Co.*, 103 Ind. 27, 2 N. E. 134; *Funk v. Beverly*, 112 Ind. 190, 13 N. E. 573; *Warbitton v. Domerett*, 129 Ind. 346, 27 N. E. 730, 28 N. E. 613; *Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868. MICH.—*Macumber v. White River Log & Boom Co.*, 52 Mich. 195, 17 N. W. 806. N. Y.—*Laub v. Buckmiller*, 17 N. Y. 620; *Conaughty v. Nichols*, 42 N. Y. 83; *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555, reversing 48 How. Pr. 166; *Lange v. Benedict*, 73 N. Y. 13, 29 Am. Rep. 80, affirming 8 Hun 362, reversing 48 How. Pr. 465, error dismissed 99 U. S. 68, 25 L. Ed. 469; *Gould v. Glass*, 19 Barb. 179; *Hatch v. Peet*, 23 Barb. 575; *Ryle v. Harrington*, 4 Abb. Pr. 421, 14 How. Pr. 59; *Ogdensburgh Bank v. Van Rensselaer*, 6 Hill 240; *Dykers v. Woodward*, 7 How. Pr. 313; *Page v. Boyd*, 11 How. Pr. 415; *Clark v. Bowe*, 60 How. Pr. 98. ORE.—*Wild*

there is a conflict between the two clauses. Specific statements can not be enlarged by construction so as to render nugatory a general statement which would otherwise be sufficient.² One of the fundamental rules of construction, as we have already seen,³ is that the entire pleading must be considered, and so construed as to give effect to the entire instrument, where that is practicable, harmonizing the various allegations, when this can be accomplished without doing violence to the law of language.⁴

The latter clause of a sentence explains and restricts the former part;⁵ and an averment of a legal conclusion at variance with an admitted fact will be disregarded.⁶ And such averment, without any fact to warrant it, is always disregarded.⁷

§ 761. — **FACTS ONLY TO BE REGARDED.** We have already seen that, in construing a pleading, no intendment

v. Oregon Short-Line & W. N. Co., 21 Ore. 159, 27 Pac. 954; Morton v. Wissinger, 58 Ore. 80, 113 Pac. 7. WASH.—Mallory v. Benway, 34 Wash. 315, 75 Pac. 869.

General averment of ownership of ditch, and that the defendant claimed an interest therein adverse to the plaintiff, while it might constitute a cause of action under the procedural code, is overcome by a subsequent specific statement of the nature of plaintiff's claim, where it clearly appears from such specific statement that the plaintiff relies upon the declaration and conduct of the defendant as operating, in its legal effect, as a grant of an easement, or as estopping the defendant from denying the title of the plaintiff in the ditch.—Haven v. Seeley, 59 Cal. 494.

General introductory statement, or a general conclusion, will al-

ways yield to a statement of the facts.—Indianapolis & St. L. R. Co. v. Johnson, 102 Ind. 354, 26 N. E. 200; Wild v. Oregon Short-Line & U. N. Co., 21 Ore. 159, 27 Pac. 954.

² Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868.

³ See, ante, § 759.

⁴ Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868.

See, also, discussion, ante, § 753.

⁵ Indianapolis & St. L. R. Co. v. Johnson, 702 Ind. 354, 26 N. E. 200; Hatch v. Peet, 23 Barb. (N. Y.) 575, 584; Wild v. Oregon Short-Line & U. N. Co., 21 Ore. 159, 27 Pac. 954.

⁶ Jones v. Phoenix Bank, 8 N. Y. 235, 1 Seld. Notes 95; Robinson v. Stewart, 10 N. Y. 189, 1 Sheld. Notes 225.

⁷ See, ante, §§ 714, 715, 728.

can be indulged by the court in favor of a pleading affirmatively or negatively ambiguous or uncertain,¹ the presumption always being that the pleader makes the best statement of his cause of action or defense that the facts will permit.² Hence it follows that in construing a pleading the court will be confined to the facts stated in such pleading, or such as are reasonably and necessarily inferred from the facts which are stated; and that a pleading can not be sustained by implication merely, unless the implication drawn necessarily follows from the facts actually set forth.³ This rule of construction is in accordance with, and complementary to, the great fundamental rule of procedural code pleading, which requires that the pleader shall, in all cases, so frame his pleading and set forth such ultimate facts, which are relied upon as the ground of action or defense, that the opposite party may be fully informed as to those facts, and as to what he must prepare to meet and overcome on the trial;⁴ and these facts are to be set out in ordinary and concise language, without repetition, the meaning of the words used to be understood in their ordinary and popular significance.⁵ And this is the reason for the rule requiring the court, in construing a pleading, to have recourse to the facts set forth only, and to the admissions made therein.⁶

§ 762. — REAL INTENT TO BE EFFECTUATED. From what is said in the last section, and the discussion heretofore of imputing to a pleading the reasonable and nec-

¹ See, ante, § 756, footnote 6.

² Id., footnote 5.

³ See, among other cases, *Emery v. Pease*, 20 N. Y. 62; *Wright v. Delafield*, 25 N. Y. 266; *Coffin v. Reynolds*, 37 N. Y. 640, 5 Trans. App. 74; *Scofield v. Whitelegge*, 49 N. Y. 259, 12 Abb. Pr. N. S. 320, affirming 33 N. Y. Super. Ct. Rep. (1 Jones & S.) 179, 10 Abb. Pr. N. S. 104; *Tooker v. Arnoux*,

76 N. Y. 397; *Gould v. Glass*, 19 Barb. (N. Y.) 179; *Ogdenburgh Bank v. Van Rensselaer*, 6 Hill (N. Y.) 240.

⁴ *Mann v. Morewood*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 557. See *Losch v. Pickett*, 36 Kan. 216, 12 Pac. 822.

⁵ See, ante, § 754.

⁶ *Spargur v. Romine*, 38 Neb. 136, 57 N. W. 523.

essary intendments thereof,¹ it follows that the function of the court, in construing a pleading, is to ascertain and give effect to the real intention of the pleader, when that can be done within the rules of construction and interpretation. And this is to be accomplished not only by giving effect to the express allegations of the entire pleading, when the parts and allegations are not in conflict,² but by also giving effect to the imputations of real intendment which necessarily arise from the facts expressly alleged.³ Before any implication can be indulged,

¹ See, ante, §§ 753, 756.

Reasonable intendment and construction to be given to the language of a pleading.—*Kidd v. Wilson*, 23 Iowa 446; *Doolittle v. Green*, 32 Iowa 124; *Allen v. Patterson*, 7 N. Y. 476, 1 Sheld. Notes 32, 57 Am. Dec. 542; *Woodbury v. Sockrider*, 2 Abb. Pr. (N. Y.) 402, 405; *Clare v. National City Bank*, 35 N. Y. Super. Ct. Rep. (3 Jones & S.) 261, 265, 14 Abb. Pr. N. S. 326, 330.

² See, ante, § 759.

³ CAL.—*Pleasant v. Samuels*, 114 Cal. 34, 37, 45 Pac. 998. GA.—*Athens Mfg. Co. v. Rucker*, 80 Ga. 291, 294, 4 S. E. 885. IND.—*Indianapolis, D. & W. R. Co. v. First Nat. Bank*, 134 Ind. 127, 33 N. E. 679. MD.—*State v. Nicholson*, 67 Md. 1, 8 Atl. 817. MICH.—*Batterson v. Chicago & G. T. R. Co.*, 49 Mich. 184, 13 N. W. 508. MINN.—*Kelly v. Rogers*, 21 Minn. 147. MO.—*State v. Horner*, 10 Mo. App. 307; *Loehr v. Murphy*, 45 Mo. App. 519. N. Y.—*Allen v. Patterson*, 7 N. Y. 478, 1 Seld. Notes 32, 57 Am. Dec. 542; *White v. Spencer*, 14 N. Y. 247; *Blackmar v. Thomas*, 28 N. Y. 67; *Lent v. New York & M. R. Co.*, 130 N. Y. 504, 28 Abb. N. C. 478,

29 N. E. 988; *Cady v. Allen*, 22 Barb. 388; affirmed, 18 N. Y. 573; *Partridge v. Badger*, 25 Barb. 146; *Magauran v. Tiffany*, 62 How. Pr. 251; *Moffatt v. McLaughlin*, 13 Hun 449; *Chamberlin v. Kaylor*, 2 E. D. Smith 134; *Mason v. Morewood*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 557; *Cudlip v. Whipple*, 11 N. Y. Super. Ct. Rep. (4 Duer) 610, 1 Abb. Pr. 106. N. D.—*Weber v. Lewis*, 19 N. D. 473, 34 L. R. A. (N. S.) 364, 126 N. W. 605. WIS.—*Morse v. Gilman*, 16 Wis. 505; *Teetshorn v. Hull*, 30 Wis. 162; *Hazleton v. Union Bank*, 32 Wis. 34; *Rossiter v. Schultz*, 62 Wis. 655, 22 N. W. 839.

Common counts supported under this rule by implying a contract and agreement to pay.—*Allen v. Patterson*, 7 N. Y. 478, 1 Seld. Notes 32, 57 Am. Dec. 542. See *Ball v. Fulton County*, 31 Ark. 379; *Pleasant v. Samuels*, 114 Cal. 34, 37, 45 Pac. 998; *Campbell v. Shiland*, 14 Colo. 491, 23 Pac. 324; *Schwartzel v. Karnes*, 2 Kan. App. 782, 44 Pac. 41; *Hurst v. Litchfield*, 39 N. Y. 377, 7 Trans. App. 182; *Fulton v. Metropolitan Life Ins. Co.*, 4 Misc. (N. Y.) 76, 23 N. Y. Supp. 598, affirming 1 Misc. 478, 21 N. Y. Supp. 470; *Weber*

however, the intended meaning must clearly appear from what is actually pleaded.⁴ To thus give effect to the real intention of the pleader by giving effect to the express allegations and necessary implications arising therefrom, there must be given to the language of the pleading the ordinary and natural meaning of the words used,⁵ and to the pleading, as thus read, a natural and not a forced construction,⁶ without supposing qualifications which, though possible, are not fairly indicated.⁷ And where the language used by the pleader is susceptible of two meanings, that meaning is to be given to the words which will support the pleading, rather than that which will defeat it.⁸

§ 763. IN ARIZONA. The general rules governing pleading and the construction of pleading in Arizona, are in conformity with those rules found in other states having the reformed procedure. The complaint and the reply in a cause are to be construed together.¹ Every reasonable intendment is to be implied to sustain a pleading,² if

v. Lewis, 19 N. D. 473, 34 L. R. A. (N. S.) 364, 126 N. W. 605.

See, also, note 34 L. R. A. (N. S.) 364.

Complaint on undertaking in discharge from arrest must state all the fact necessary to constitute the cause of action; a simple allegation of the undertaking and its breach, does not warrant the court in presuming issuance of execution against property and return unsatisfied, and execution against the person.—Gauntley v. Wheeler, 31 How. Pr. (N. Y.) 137.

⁴ Neudecker v. Kohlberg, 81 N. Y. 296.

⁵ See, ante, § 754.

⁶ Lammers v. Meyer, 59 Ill. 217; Batterson v. Chicago & G. T. R. Co., 49 Mich. 184, 13 N. W. 508.

See, also, ante, § 753, footnotes 4 and 5.

⁷ Batterson v. Chicago & G. T. R. Co., 49 Mich. 184, 13 N. W. 508.

⁸ Kidd v. Wilson, 23 Iowa 466; Doolittle v. Green, 32 Iowa 124; Allen v. Patterson, 7 N. Y. 476, 1 Seld. Notes 32, 57 Am. Dec. 542; Woodbury v. Sackrider, 2 Abb. Pr. (N. Y.) 402, 405; Clare v. National City Bank, 35 N. Y. Super. Ct. Rep. (3 Jones & S.) 261, 265, 14 Abb. Pr. N. S. 326, 330.

See, also, ante, § 754, footnotes 5 to 9, and text.

¹ Malino v. Blake, 5 Ariz. 319, 52 Pac. 366.

² Phillips v. Smith, 11 Ariz. 309, 95 Pac. 91; Hicks v. Krigbaum, 13 Ariz. 237, 108 Pac. 482; Machomic Mercantile Co. v. Hickey, 15 Ariz.

possible,³ with a view to substantial justice between the parties;⁴ but a complaint defective in averment can not be supported by construction.⁵

§ 764. IN COLORADO. Under the procedural code of Colorado,—and all other procedural codes, for that matter,—the fundamental rules as to construction, above laid down, control. But in those cases in which no objection is taken to a pleading which is ambiguous or uncertain, the rule that it is to be strictly construed against the pleader does not apply.¹ A statement of the legal effect of a written instrument made in a pleading,—which is merely a conclusion of law,²—followed by a copy of the written instrument, being in the nature of a general followed by a specific statement, such statement will be controlled by the copy of the instrument.³ An affirmative defense being under construction, all the allegations in the answer are to be considered, and not merely one or more of the paragraphs thereof.⁴ After issue joined, in the absence of a demurrer, where the complaint declares on an alleged indebtedness for services and avers a promise to pay therefor, it will be presumed that the promise to pay was made before the services were rendered.⁵

421, 140 Pac. 63; *Wadin v. Czuczka*, 16 Ariz. 371, 146 Pac. 491.

“More than one person” charged in complaint to have voted at an election for bonds in favor of the issue who was not a taxpayer in the district, this was held tantamount to an allegation that two such persons voted for the bonds.—*Hicks v. Krigbaum*, 13 Ariz. 237, 108 Pac. 482.

³ *Phillips v. Smith*, 11 Ariz. 309, 95 Pac. 91; *Machomic Mercantile Co. v. Hickey*, 15 Ariz. 421, 140 Pac. 63.

⁴ *Gill v. Manhattan Life Ins. Co.*, 11 Ariz. 232, 95 Pac. 89.

⁵ *Gill v. Manhattan Life Ins. Co.*, 11 Ariz. 232, 95 Pac. 89.

¹ *Mulock v. Wilson*, 19 Colo. 296, 35 Pac. 532.

² See, ante, § 715.

³ *Patrick v. Colorado Smelting Co.*, 20 Colo. 268, 38 Pac. 236.

See, ante, § 760.

⁴ *National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 20 L. R. A. (N. S.) 340, 98 Pac. 634.

See, ante, § 759.

⁵ *Black v. Bent*, 20 Cal. 342, 38 Pac. 387.

§ 765. IN IDAHO. The forms of pleadings in civil actions, and the rules by which their sufficiency is to be determined, are prescribed by the Idaho procedural code,¹ under which² all allegations as to a cause of action, or as to a defense pleaded, are to be liberally construed, with a view to substantial justice between the parties,³ and not to be construed most strongly against the pleader,⁴ effect being given to the reasonable intendments to be implied from the express allegations.⁵

Character and sufficiency of a pleading are to be determined from the facts set up and the relief asked, not from the name the pleader gives to his pleading;⁶ and the right of recovery will not be limited by the name given to a party's pleading, except in those cases in which the adverse party was thereby misled to his prejudice;⁷ but a complaint which fails to state the ultimate facts constituting the plaintiff's cause of action can not be supported by construction, and any favorable judgment thereon will be reversed on appeal.⁸

Attack after judgment made for the first time upon the sufficiency of the complaint to state a cause of action, in construing the pleading assailed the court will indulge every reasonable intendment in its favor, and all reasonable inferences of fact will be deemed to have been

¹ See Rev. Codes, § 4161.

² Id., § 4207.

³ Cantwell v. McPherson, 3 Idaho 271, 34 Pac. 1095; Stuart v. Noble Ditch Co., 9 Idaho 765, 76 Pac. 255; Nobach v. Scott, 20 Idaho 558, 119 Pac. 295.

⁴ Cantwell v. McPherson, 3 Idaho 271, 34 Pac. 1095.

⁵ McCormick v. Smith, 23 Idaho 487, 130 Pac. 999.

See, ante, § 762.

⁶ Swank v. Sweetwater Irr. & Power Co., 15 Idaho 353, 98 Pac. 297. See McDougald v. Hulet, 132 Cal. 154, 64 Pac. 278; Tutty v. Ryan, 13 Wyo. 134, 78 Pac. 657, 79 Pac. 920.

⁷ Swank v. Sweetwater Irr. & Power Co., 15 Idaho 353, 98 Pac. 297.

⁸ Trueman v. St. Maries, Village of, 21 Idaho 632, 123 Pac. 508.

See, ante, § 758, footnotes 16-18, and text.

directly alleged, for the purpose of sustaining the judgment.⁹

§ 766. **IN KANSAS.** We have already seen that in those cases in which a general averment is followed by a specific averment, the latter controls the former;¹ and in Kansas it has been said that where a specific title is set up followed by a general averment, the latter will be construed to refer to the specific title.² Pleadings are to be construed as of the date of the commencement of the action, and the rights of the parties determined as of that date.³ In considering pleadings as to their sufficiency, they are to be given a liberal construction with a view to substantial justice between the parties,⁴ and not to be so construed as to defeat them by undue technicality.⁵ After issue joined, a pleading attacked will be liberally construed, and, if possible, will be sustained;⁶ all reasonable intendments will be indulged, though not formally expressed,⁷ and considerable latitude will be

⁹ *Newport Water Co. v. Kellogg* (Idaho), 174 Pac. 602.

¹ See, ante, § 760.

² *Armor Bros. Banking Co. v. Riley County Bank*, 30 Kan. 163, 1 Pac. 506.

³ *Brown v. Galena Min. & Smelt. Co.*, 32 Kan. 528, 4 Pac. 1013.

⁴ *Smith v. McCarthy*, 39 Kan. 308, 18 Pac. 204; *Browning v. Browning*, 89 Kan. 98, 130 Pac. 852; *Blair v. McQuary*, 100 Kan. 203, 162 Pac. 1173, 164 Pac. 262; *Atchison, T. & S. F. R. Co. v. Mason*, 4 Kan. App. 391, 46 Pac. 31.

Annulment of marriage asked on ground wife had not been divorced from former spouse, court will presume former husband living.—*Browning v. Browning*, 89 Kan. 98, 130 Pac. 852.

Fraud and consequent damage

in procuring credit for insolvents alleged, liberally construed.—*Blair v. McQuary*, 100 Kan. 203, 162 Pac. 1173, 164 Pac. 262.

⁵ *Smith v. McCarthy*, 39 Kan. 308, 18 Pac. 204.

⁶ *State v. School Dist.*, 34 Kan. 327, 8 Pac. 208; *Missouri Pac. R. Co. v. Morrow*, 36 Kan. 495, 13 Pac. 789; *Burnette v. Elliott*, 72 Kan. 624, 84 Pac. 374; *Upham v. Head*, 74 Kan. 17, 85 Pac. 1017; *Simmonds v. Richards*, 74 Kan. 311, 86 Pac. 452; *Mills v. Vickers*, 6 Kan. App. 884, 50 Pac. 976.

⁷ *Barker v. Moodie*, 92 Kan. 566, 141 Pac. 562; *Roberts v. Pendleton*, 92 Kan. 847, 142 Pac. 289.

Complaint for injuries, in action by employee, alleging employer knew or should have known of certain alleged defects, held to be an implied allegation that such de-

allowed to the court in sustaining a complaint.⁸ After judgment, a favorable construction will be given to a pleading in support of the judgment recovered thereon.⁹ A pleading susceptible of two constructions, that the party (1) is honest and honorable, and (2) immoral and criminal, the court will give to it the first construction;¹⁰ but where a pleading contains allegations both affirming and denying a particular fact, the court may adopt the one most strongly against the pleader's interests;¹¹ and in those cases in which a number of causes of action are alleged, and a variety of reliefs demanded, the court will construe the pleading strictly against the pleader.¹²

§ 767. **IN MONTANA.** In Montana, also, the pleadings are to be liberally construed,¹ with a view to substantial justice between the parties,² and whatever is necessarily implied by the allegations in a pleading, or reasonably to be inferred therefrom, is to be taken as directly alleged;³ but this rule does not permit the court to read, by implication, into the pleading omitted material facts

facts existed.—*Roberts v. Pendleton*, 92 Kan. 847, 142 Pac. 289.

⁸ *Burnette v. Elliott*, 72 Kan. 624, 84 Pac. 374.

⁹ *Missouri Pac. R. Co. v. Morrow*, 36 Kan. 495, 13 Pac. 789; *Kansas City & S. W. R. Co. v. Farnsworth*, 39 Kan. 356, 18 Pac. 202.

¹⁰ *Atchison, T. & S. F. R. Co. v. Atchison Grain Co.*, 68 Kan. 585, 1 Ann. Cas. 639, 70 Pac. 93, 75 Pac. 1051.

¹¹ *Losch v. Pickett*, 36 Kan. 216, 12 Pac. 822.

See, ante, § 756, footnote 4.

¹² *Thomas v. Sweet*, 37 Kan. 183, 14 Pac. 545.

¹ *Spencer v. Montana Cent. R. Co.*, 11 Mont. 164, 27 Pac. 681.

² Mont. Rev. Codes, § 6566; *Silver Bow County v. Davies*, 40

Mont. 418, 107 Pac. 81; *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673.

³ *Silver Bow County v. Davies*, 40 Mont. 418, 107 Pac. 81; *Ellinghouse v. Ajax Live Stock Co.*, 51 Mont. 275, L. R. A. 1916D, 836, 152 Pac. 481; *Marcellus v. Wright*, 51 Mont. 559, 154 Pac. 714; *Buhler v. Loftus*, 53 Mont. 546, 165 Pac. 601.

Attacked on appeal for the first time, this is especially the rule.—*Ellinghouse v. Ajax Live Stock Co.*, 51 Mont. 275, L. R. A. 1916D, 836, 152 Pac. 481.

Death of husband sufficiently shown when the facts are alleged from which the inference of his death is fairly deducible.—*Marcellus v. Wright*, 51 Mont. 559, 154 Pac. 714.

necessary to make the pleading state a cause of action or a defense attempted to be pleaded.⁴ The sufficiency of a pleading is to be determined by the statement of facts from which the legal duty is deducted.⁵

§ 768. IN NEVADA. The same general rules as to liberal construction of pleadings, with a view to substantial justice between the parties, and as to presumption of necessary intendments, prevails in Nevada, with the like limitations and restrictions heretofore discussed. Thus, it has been there held that in an action to enjoin the state engineer and a district water commissioner from shutting off the water from plaintiff's irrigation ditch, where the complaint does not show that there were other users of the water constituting the plaintiff's source of supply, or that there were others who had a right to use all or any of the water the plaintiff claimed to have appropriated, on demurrer to the sufficiency of the complaint the existence of such other persons entitled to the use of the water claimed could not be presumed by the court in support of the demurrer.¹

§ 769. IN NEW MEXICO. The liberal rule of construction and interpretation of pleadings prevails in New Mexico, and will be indulged to uphold a judgment based thereon, where the errors or defects complained of were not pointed out at the trial of the cause.¹ And in this state the court may look to the complaint itself in order to ascertain or determine on what the claim for damages is based, although the prayer is merely for a specified

⁴ Allen v. Bear Creek Coal Co., 43 Mont. 269, 115 Pac. 673.

See, ante, § 758, footnotes 16-18.

⁵ Haskins v. Northern Pac. R. Co., 39 Mont. 394, 102 Pac. 988.

¹ Knox v. Kearney, 37 Nev. 393, 142 Pac. 526.

¹ State Bank of Commerce v. Western Union Tel. Co., 19 N. M.

211, L. R. A. 1915A, 120, 142 Pac. 156; Childers v. Lahann, 19 N. M. 301, 142 Pac. 924; Cleveland v. Bateman, 21 N. M. 675, 158 Pac. 648.

Admission in answer not called to the attention of the court on the trial will not be available on appeal. — Childers v. Lahann, 19 N. M. 301, 142 Pac. 924.

sum of money as damages.² The prayer for relief is no part of a pleading, and can not be looked to by the court in determining the nature and sufficiency thereof.³

Objection on appeal, raised for the first time, as to the sufficiency of a complaint to state a good cause of action, the complaint will be liberally construed for the purpose of upholding the judgment, if possible; and where it contains allegations from which every fact necessary to maintain the action may reasonably be inferred, the pleading will be upheld.⁴

§ 770. IN NORTH DAKOTA. The procedural code of North Dakota¹ provides that the pleadings in a cause shall be liberally construed.² The rule that the pleadings are to be strictly construed against the pleader, no longer exists in this state.³ Under this liberal rule of construction, a complaint attacked by demurrer on the ground of insufficiency to state a cause of action, is to be upheld whenever it contains allegations of ultimate facts sufficient to apprise the defendant of the nature of the plaintiff's claim against him;⁴ and where a pleading is attacked at the trial by motion, or an objection to the admission of evidence, it will be more liberally construed than where attacked by demurrer.⁵

§ 771. IN OKLAHOMA. Under the statutes of Oklahoma, present and past,¹ in the construction or interpretation

² *Atchison, T. & S. F. R. Co. v. Citizens' Traction & Power Co.*, 16 N. M. 163, 113 Pac. 813.

³ *Morgan v. Doughton* (N. M.), 171 Pac. 1051.

⁴ *Morgan v. Doughton* (N. M.), 171 Pac. 503.

¹ N. D. Rev. Codes 1905, § 6869.

² *First Nat. Bank v. Messner*, 25 N. D. 263, 141 N. W. 999.

³ *Donovan v. St. Anthony & D. Elevator Co.*, 7 N. D. 513, 75 N. W.

809; *Kidder County v. Foye*, 10 N. D. 424, 87 N. W. 984; *First Nat. Bank v. Messner*, 25 N. D. 263, 141 N. W. 999.

⁴ *Weber v. Lewis*, 19 N. D. 473, 34 L. R. A. (N. S.) 364, 126 N. W. 105.

⁵ *Christofferson v. Wee*, 24 N. D. 506; *Guild v. More*, 32 N. D. 432, 155 N. W. 44.

¹ Okla. Rev. Laws 1910, § 466; Comp. Laws 1909, § 5655; Stats. Okla. Tr. 1893, § 3993.

of pleadings, for the purpose of determining their effect, the allegations thereof are to be liberally construed, with a view to substantial justice between the parties.² Under this rule the actual allegations in a pleading are to be so construed that substantial justice may be done between the parties,³ but in those cases in which substantial necessary allegations are lacking in a pleading, they can not be construed into it in such a manner as to make sufficient that which is insufficient,⁴ unless the lacking averments must necessarily be inferred from other pleadings;⁵ and a necessary averment not directly alleged can not be inferred from other ultimate facts set out, except in those cases in which such lacking averment must logically and necessarily be inferred from such other facts set out.⁶ The fundamental rule of construction that a general statement is controlled by a following specific statement, whether the general statement is to be regarded simply as a conclusion of law or not,⁷ is applied in Oklahoma.⁸ Thus, where a complaint in a personal injury action contains a general averment of negligence, and then sets out the particular acts constituting the negligence complained of, it will be construed as presenting such issues, only, as are found in the allegations as to the specific acts constituting the negligence charged.⁹

² *Emmerson v. Botkin*, 26 Okla. 218, 138 Am. St. Rep. 953, 29 L. R. A. (N. S.) 786, 109 Pac. 531; *Cook v. State*, 35 Okla. 653, 130 Pac. 300.

³ *Emmerson v. Botkin*, 26 Okla. 218, 138 Am. St. Rep. 953, 29 L. R. A. (N. S.) 786, 109 Pac. 531.

⁴ *Emmerson v. Botkin*, 26 Okla. 218, 138 Am. St. Rep. 953, 29 L. R. A. (N. S.) 786, 109 Pac. 531; *Weatherly v. Sawyer* (Okla.), 163 Pac. 717.

⁵ *Weatherly v. Sawyer* (Okla.), 163 Pac. 717.

⁶ *Emmerson v. Botkin*, 26 Okla.

218, 138 Am. St. Rep. 953, 29 L. R. A. (N. S.) 786, 109 Pac. 531.

⁷ See, ante, § 760.

⁸ *Whitaker v. Crowder State Bank*, 26 Okla. 786, 110 Pac. 776; *Chicago, R. I. & P. R. Co. v. McIntire*, 29 Okla. 797, 119 Pac. 1008.

⁹ *Chicago, R. I. & P. R. Co. v. McIntire*, 29 Okla. 797, 119 Pac. 1008.

Action to enjoin ferry landing at end of public street, brought by abutting owner, allegation in complaint that plaintiff will suffer irreparable injury unless landing enjoined, is controlled and nega-

Pleading attacked before trial by demurrer, on the ground of insufficiency to state a cause of action or defense, where the language of the pleading is ambiguous or uncertain, it will be construed against the pleader;¹⁰ and where the demurrer is sustained, and no application for leave to amend is made, it will be presumed that the facts to sustain such an amendment did not exist.¹¹ On such an attack on a pleading nothing not specifically averred will be presumed in favor of the pleader;¹² and it has been said that no presumption is to be indulged in favor of a complaint amended for the third time.¹³

Objection at the trial made to the sufficiency of a pleading, or to the introduction of evidence because the facts constituting the cause of action or of defense are not sufficiently stated, is never favored by the courts,¹⁴ and will be disregarded unless there is a total failure to allege matter essential to the relief sought.¹⁵ Every intentment will be resolved in favor of a pleading first objected to on the introduction of evidence; and in such a case the court will look to the attached exhibits to supply defects in the allegations in the complaint.¹⁶

tived by a subsequent specific allegation by which it is shown that the mere fact of the proposed landing was the sole ground upon which the relief was demanded.—*Hale v. Record* (Okla.), 168 Pac. 420.

¹⁰ *Emmerson v. Botkin*, 26 Okla. 218, 138 Am. St. Rep. 953, 29 L. R. A. (N. S.) 786, 109 Pac. 531; *Lusk v. Porter*, 53 Okla. 294, 156 Pac. 224; *Fritz v. Edmond, City of* (Okla.), 168 Pac. 800.

Attacked by general demurrer, it was recently held that the complaint must be liberally construed in favor of the pleader.—*Ruby v. Warrior* (Okla.), 175 Pac. 355.

¹¹ *Emmerson v. Botkin*, 26 Okla.

1 Code Pl. and Pr.—69

218, 138 Am. St. Rep. 953, 29 L. R. A. (N. S.) 786, 109 Pac. 531.

¹² *Atwood v. Rose*, 32 Okla. 355, 122 Pac. 929.

¹³ *Schilling v. Moore*, 34 Okla. 155, 125 Pac. 487.

¹⁴ *Hogan v. Bailey*, 27 Okla. 15, 110 Pac. 890, following *Mitchell v. Milhoan*, 11 Kan. 617, and *Barkley v. State*, 15 Kan. 99.

¹⁵ *Hogan v. Bailey*, 27 Okla. 15, 110 Pac. 890, following *Mitchell v. Milhoan*, 11 Kan. 617; *Carr v. Seigler* (Okla.), 153 Pac. 141; *Ruby v. Warrior* (Okla.), 175 Pac. 335.

¹⁶ *Minetonka Oil Co. v. Cleveland Vitrified Brick Co.*, 48 Okla. 745, 150 Pac. 712.

Pleading attacked on appeal for the first time, on the ground that it does not state facts sufficient to constitute a cause of action or a defense, will be liberally construed to uphold the judgment of the trial court,¹⁷ when by giving to the pleading such a construction a good cause of action or defense is set out.¹⁸ Thus, where a counter-claim of a defendant was not objected to in the trial court, but which would have been subject to a motion to make it more definite and certain, this will not furnish a ground for disturbing a judgment in favor of such defendant.¹⁹ In the absence of a motion or demurrer, or an objection to introduction of evidence on the trial, and of the incorporation of the point in a motion for a new trial, it will be too late on appeal to object for the first time to the sufficiency of the complaint.²⁰

§ 772. IN OREGON. The Oregon statute, also, provides that pleadings are to be liberally construed, with a view to substantial justice between the parties;¹ and particularly will this rule be applied in those cases in which the pleading is not challenged by demurrer,² but objection is

¹⁷ *Wass v. Tennent-Stribling Shoe Co.*, 3 Okla. 152, 41 Pac. 339; *Young v. Severly*, 5 Okla. 630, 49 Pac. 1024; *Bohart v. Mathews*, 29 Okla. 315, 116 Pac. 944; *Cook v. State*, 35 Okla. 653, 130 Pac. 300; *Brown Shoe Co. v. Cuff*, 37 Okla. 776, 132 Pac. 1090; *Hoehler v. Short*, 40 Okla. 681, 140 Pac. 146.

¹⁸ *Hoehler v. Short*, 40 Okla. 681, 140 Pac. 146.

¹⁹ *Brown Shoe Co. v. Cuff*, 37 Okla. 776, 132 Pac. 1090.

²⁰ *Caddo Nat. Bank v. Moore*, 30 Okla. 148, 120 Pac. 1003.

Question should have been raised by motion for new trial in the trial court, and not having been raised, is deemed waived.— See *McDonald v. Carpenter*, 11 Okla. 115, 65 Pac. 942; *White v.*

Madison, 16 Okla. 212, 83 Pac. 798; *Caddo Nat. Bank v. Moore*, 30 Okla. 148, 120 Pac. 148. The last case cites, as sustaining such a ruling, *Nichols, Shepard Co. v. Ringler*, 135 Iowa 181, 112 N. W. 543; *Michaels v. McRoy*, 148 Mich. 577, 112 N. W. 129; *Leggat v. Garrick*, 35 Mont. 91, 8 L. R. A. (N. S.) 1239, 88 Pac. 788; *Hofhelmer v. Campbell*, 59 N. Y. 260, affirming 7 Lans. 157; *Knapp v. Simon*, 96 N. Y. 284, 6 N. Y. Civ. Proc. Rep. 1; *Crane Co. v. Aetna Indemnity Co.*, 43 Wash. 516, 86 Pac. 850.

¹ Hill's Ann. Ore. Laws, § 84.

² *McHargue v. Calchina*, 78 Ore. 326, 153 Pac. 99; *Siverson v. Clanton*, 88 Ore. 261, 170 Pac. 933, 171 Pac. 1051.

made to the sufficiency thereof on the introduction of evidence.³ The allegations in the complaint and in the reply, where they are not repugnant, will be construed together as in *pari materia*, in ascertaining the true intent of the pleader;⁴ and an issue made by the answer and the reply thereto, as to a fact that ought to have been alleged in the complaint, cures the omission.⁵ The general rule that where a general allegation in a pleading is followed by a special allegation, the latter controls the former,⁶ is affirmed in Oregon.⁷ Thus, where the complaint in a personal injury cause contains a general charge of negligence, followed by an allegation of the specific facts constituting the negligence complained of, the facts specifically stated govern the general allegation of negligence;⁸ and in an action on a fire insurance policy, a general averment of ownership of the property destroyed, is controlled by a special averment that the plaintiff held as trustee.⁹

An answer is to be so construed as to give it a fair meaning;¹⁰ and where an answer does not plead an estoppel, but sets up facts constituting an estoppel, the allegations of such answer will be given their legal effect on appeal.¹¹ An amended answer, not attacked by demurrer or motion, will be construed liberally, and will be upheld where the facts would support a verdict rendered in

As to rule on demurrer on motion before trial, see footnotes 20-24, this section.

³ *Patterson v. Patterson*, 40 Ore. 560, 67 Pac. 664.

See, also, footnotes 25 and 26, and text, this section.

⁴ *Patterson v. Patterson*, 40 Ore. 560, 67 Pac. 664; *Lanery v. Arnold*, 36 Ore. 84, 57 Pac. 906, 58 Pac. 524.

⁵ *Easton v. Quackenbush*, 86 Ore. 374, 168 Pac. 631.

⁶ See, ante, § 760.

⁷ *Gynther v. Brown*, 67 Ore. 310, 134 Pac. 1186; *Howard v. Horticultural Fire Relief of Oregon*, 77 Ore. 439, 150 Pac. 270, 151 Pac. 476.

⁸ *Gynther v. Brown*, 67 Ore. 310, 134 Pac. 1186.

⁹ *Howard v. Horticultural Fire Relief of Oregon*, 77 Ore. 349, 150 Pac. 270, 151 Pac. 476.

¹⁰ *Morton v. Wissinger*, 58 Ore. 80, 113 Pac. 7.

¹¹ *Grand Prize Hydraulic Mines v. Boswell*, 83 Ore. 1, 162 Pac. 1063.

favor of the defendant thereon.¹² The defense of the statute of limitations should be set up in the answer as new matter; however, if it is not so pleaded, and the facts constituting it are specifically alleged, that is sufficient, in the absence of objection at the trial to the introduction of evidence to sustain such allegation.¹³

After verdict, a pleading not attacked by demurrer or motion, is entitled to all the reasonable intendments in its favor, to support the verdict and any judgment rendered thereon,¹⁴ the verdict curing the defect.¹⁵ Hence a complaint merely defective, and not insufficient in alleging a right of action, is sufficient after a verdict for the plaintiff,¹⁶ even in those cases in which it would have been bad if demurred to;¹⁷ but a material averment lacking in a pleading can not be supplied by verdict.¹⁸ Thus, a complaint in an action for a personal injury, which is ambiguous and uncertain as to whether the plaintiff counts upon negligence of an engineer of the defendant, or upon defendant's failure to furnish a safe place in which to work, will be sufficient after verdict on the theory that defendant failed to furnish a safe place in which to work.¹⁹

Pleading attacked before trial by demurrer or motion, is to be construed strongly against the pleader,²⁰ more strongly than where the sufficiency is challenged on the

¹² Johnson v. Sheridan Lumber Co., 51 Ore. 35, 93 Pac. 470.

¹³ Kohler & Chase Co. v. Savage, 86 Ore. 639, 167 Pac. 789.

¹⁴ Davis v. Mitchell, 72 Ore. 165, 142 Pac. 788; Welshaar v. Pendleton, 73 Ore. 190, 144 Pac. 401; Smith v. National Surety Co., 77 Ore. 17, 149 Pac. 1040.

¹⁵ Lindstrom v. National Life Ins. Co., 84 Ore. 588, 165 Pac. 675.

¹⁶ Minter v. Minter, 80 Ore. 369, 157 Pac. 157.

¹⁷ Welshaar v. Pendleton, 73 Ore. 190, 144 Pac. 401.

¹⁸ Lindstrom v. National Life Ins. Co., 84 Ore. 588, 165 Pac. 675.

¹⁹ Gynther v. Brown, 67 Ore. 310, 134 Pac. 1186.

²⁰ Pursel v. Deal, 16 Ore. 295, 18 Pac. 461; Kohn v. Hinshaw, 17 Ore. 308, 20 Pac. 629; Keene v. Eldridge, 47 Ore. 179, 82 Pac. 803; Haines v. Forest Grove, City of, 54 Ore. 443, 103 Pac. 775; Brooks v. Northern Pac. R. Co., 58 Ore. 387, 114 Pac. 949.

trial by a motion to exclude the introduction of evidence.²¹ On demurrer, in case of doubt^t, a pleading is to be construed strongly against the pleader,²² and that construction given which is most favorable to the opposite party;²³ and facts not alleged are to be presumed not to exist.²⁴

Objections on trial are not favored by the courts,²⁵ and in construing a pleading thus challenged all reasonable intendments are to be invoked in favor of the sufficiency of the pleading.²⁶

Pleading attacked on appeal for the first time, as not stating a cause of action or defense, the objection not having been presented to the trial court, the pleading will be more liberally construed than when challenged by demurrer or motion before trial.²⁷

§ 773. IN SOUTH DAKOTA. The South Dakota procedural code contains a provision requiring that, in the construction of pleadings, all the allegations thereof shall be liberally construed, to promote substantial justice between the parties.¹ Under this provision a pleading attacked is to be construed to allege all the facts which can, by fair and reasonable intendment, be implied from the facts which are alleged.²

Objections on the trial to the sufficiency of a pleading, and especially to a complaint, on the ground that it does not state facts sufficient to constitute a cause of action

²¹ Keene v. Eldridge, 47 Ore. 179, 82 Pac. 803.

See footnotes 25 and 26 and text, this section.

²² Libby v. Olcott, 66 Ore. 124, 134 Pac. 13.

²³ Interior Warehouse Co. v. Dunn, 80 Ore. 528, 157 Pac. 806.

²⁴ Libby v. Olcott, 66 Ore. 124, 134 Pac. 13.

²⁵ See, ante, § 771, footnotes 14 et seq.

²⁶ Keene v. Eldridge, 47 Ore. 179, 82 Pac. 803; Quick v. Swing, 53 Ore. 149, 99 Pac. 418.

²⁷ Keady v. United R. Co., 57 Ore. 325, 108 Pac. 197; Siverson v. Clanton, 88 Ore. 261, 170 Pac. 933, 171 Pac. 1051.

¹ S. D. Code Proc., § 136.

² Dunlap v. Chicago, M. & St. R. R. Co., 32 S. D. 581, 144 N. W. 226.

or a defense, as the case may be, by an objection to the introduction of evidence,³ where an issue has been raised by the filing of an answer, is not favored by the courts,⁴ and greater latitude of presumption as to intendments may be indulged to sustain the sufficiency of the pleading than is allowed where the attack is made by demurrer interposed before trial;⁵ but this rule can be invoked in those cases, only, in which the objection is overruled, and the cause being tried on its merits, the imperfections assailed in the pleadings are cured by the proof.⁶ And under the provisions of the procedural code⁷ empowering the trial court, where an answer has been served, to grant any relief consistent with the cause made by the complaint and within the issues thereof, the court, in construing a complaint thus attacked, is not confined to the prayer of the complaint and the relief asked for.⁸

—*An answer* is governed by the same rule of interpretation in this regard as is the complaint;⁹ and a case where the answer alleged that the plaintiff had knowledge that the defendant was a surety on the note sued on, when thus objected to, was construed to be a direct allegation of suretyship.¹⁰

Pleadings attacked on appeal for the first time, the sufficiency not having been challenged in the court below, they are to be construed liberally.¹¹ Thus, where a com-

³ Whitbeck v. Sees, 10 S. D. 417, 73 N. W. 915; Woodford v. Kelley, 18 S. D. 615, 101 N. W. 1069.

⁴ Anderson Lumber Co., J. F., v. Spears, 25 S. D. 624, 127 N. W. 643.

See, also, ante, § 771, footnotes 14 et seq., and § 772, footnotes 25 and 26.

⁵ Anderson v. Alseth, 6 S. D. 566, 62 N. W. 435; Whitbeck v. Sees, 10 S. D. 417, 73 N. W. 915; Anderson Lumber Co., J. F., v.

Spears, 25 S. D. 624, 127 N. W. 643.

⁶ Bon Homme County v. McLouth, 19 S. D. 555, 104 N. W. 256.

⁷ S. D. Rev. Code Proc., § 311.

⁸ Woodford v. Kelley, 18 S. D. 615, 101 N. W. 1069.

⁹ Bunker v. Taylor, 10 S. D. 526, 74 N. W. 450.

¹⁰ Bunker v. Taylor, 10 S. D. 526, 74 N. W. 450.

¹¹ Radee v. Seaman, 33 S. D. 184, 145 N. W. 441; Nielson v. Edwards, 34 S. D. 399, 148 N. W. 844.

plaint attempted to allege a cause of action for deceit, which deceit consisted in the assertion as a fact of that which was not true, by one who had no reasonable ground for believing it to be true, the sufficiency of the complaint not having been attacked by demurrer, or by motion to make more definite and certain, in the court below, the complaint was liberally construed on appeal to sustain the judgment, the court holding that the complaint was sufficient to raise an issue without setting out the facts upon which the pleader based the allegation of deceit.¹²

§ 774. IN UTAH. The rule as to a liberal construction of pleadings, for the purpose of determining their sufficiency and effect, with a view to substantial justice between the parties, is provided for by the Utah statutes.¹ Under this rule of construction,—while a pleading should state directly the ultimate facts relied upon,—a defective allegation may be aided by an inference or presumption reasonably drawn from facts alleged;² but this rule of construction is ineffective to cure a substantial defect in a complaint in that it fails to state an indebtedness.³ Formality in pleadings being abolished, the mere form of denial of allegations in a complaint is not to be held conclusive upon the pleader; and where the denials in an answer are so cast as to be in the form of a negative pregnant,⁴ followed by a sweeping general denial, the answer will be sufficient, where it is clear that a denial of such allegations was manifestly the intention of the pleader.⁵ The language of a pleading is to be given its ordinary meaning, and be construed according to the

¹² *Nielson v. Edwards*, 34 S. D. 399, 148 N. W. 844, approving and following *American Nat. Bank v. Grace*, 67 Hun (N. Y.) 432, 22 N. Y. Supp. 121.

¹ Utah Rev. Stats. 1898, § 2986; Comp. Laws 1907, § 2986.

² *Tate v. Rose*, 35 Utah 229, 99

Pac. 1003; *Tate v. Shaw*, 35 Utah 240, 99 Pac. 1007.

³ *Chesney v. Chesney*, 33 Utah 503, 14 Ann. Cas. 835, 94 Pac. 989.

⁴ As to negative pregnant, see, ante, § 375.

⁵ *Hancock v. Luke*, 46 Utah 26, 148 Pac. 452.

established rules of grammar;⁶ thus, where the creditor of a firm, seeking to follow its property into the hands of purchasers, alleged that the firm "is" insolvent, it was held that the complaint could not be construed as alleging that the firm was insolvent at the time of the sale.⁷

Objection on the trial being made to the introduction of evidence, on the ground that the complaint is insufficient to state a cause of action, the allegations of that pleading are to be deemed true.⁸

Objection on appeal, for the first time, to the sufficiency of a pleading, the court must construe its allegations liberally and support the judgment, if possible.⁹

§ 775. IN WASHINGTON. The procedural code of Washington requires that in the construction of pleadings, for the purpose of determining their nature and effect, the allegations shall be liberally construed¹ with the view to substantial justice between the parties,² thereby abrogating the common-law rule that a pleading is to be strongly construed against the pleader. Under this rule the pleading is to be measured and judged by the substance of the allegations thereof, and not by the title or name the pleader chooses to give to his pleading, being construed to be sufficient in all those cases in which the required facts are all set out;³ and a suitor will not be turned out of court, if, by indulging all reasonable intendments in his favor, enough can be seized hold of in the pleading to show that the party has rights which ought to be enforced.⁴ But where a pleading is defective in that it

⁶ See, ante, § 753.

⁷ Jensen v. Montgomery, 29 Utah 89, 80 Pac. 504.

⁸ Salt Lake County v. Clinton, 39 Utah 462, 117 Pac. 1075.

⁹ Wright v. International Motor Co. (Utah), 177 Pac. 237.

¹ Wash. Code, § 94.

² Isaacs v. Holland, 4 Wash. 54, 29 Pac. 976.

³ Johnson v. Pacific Bank & Store Fixture Co., 59 Wash. 58, 109 Pac. 205.

⁴ Chambers v. Hoover, 3 Wash. Tr. 107, 13 Pac. 466; Isaacs v. Holland, 4 Wash. 54, 29 Pac. 976.

fails to set out the necessary facts, or facts from which the necessary facts may reasonably be inferred or implied, or if it fails to make the necessary distinct negative averments, the pleading will be insufficient and can not be remedied by construction; thus, where a complaint alleges that a city ordinance wrongfully provided for its adoption by a majority of the electors, instead of by three-fifths of the electors, without further allegation, it does not allege that the ordinance was not adopted by a vote of three-fifths of the electors;⁵ if it was not so adopted that fact should have been positively negatived. On the other hand, a complaint in an action by an employee of an independent contractor to recover for a personal injury, an allegation that there was an "agreement" between the independent contractor and the defendant railway company, whereby the latter was to transport the employees of the former, who was engaged in building a part of the railway track of the road, was construed as alleging that there was a contract between the railroad company and the contractor to that effect.⁶

On demurrer before trial the pleading will be liberally construed, as against a general demurrer,⁷ much favor being extended to it,⁸ and it will be deemed to allege whatever can be implied from its statements, by fair and reasonable intendment.⁹

On demurrer after opening statement of the cause by counsel, challenging the sufficiency of the complaint on counsel's theory of the case,¹⁰ the pleading will be treated in the same manner as in the case of an attack upon the

⁵ *Faulkner v. Seattle, City of*, 19 Wash. 320, 53 Pac. 365.

⁶ *Boyle v. Great Northern R. Co.*, 13 Wash. 383, 43 Pac. 344.

⁷ *Hart v. Kings County (Wash.)*, 177 Pac. 344; *Hotel Cecil Co. v. Seattle, City of (Wash.)*, 177 Pac. 347.

⁸ *Hotel Cecil Co. v. Seattle, City of (Wash.)*, 177 Pac. 347.

⁹ *Malloy v. Benway*, 34 Wash. 315, 75 Pac. 869.

¹⁰ As to theory of the case, see, ante, §§ 528-534.

complaint after verdict and judgment,¹¹ and every reasonable intendment will be indulged in its support.¹²

Objection on the trial to the introduction of evidence, on the ground of the insufficiency of the pleading to constitute a cause of action or defense, the pleading will be liberally construed, and given the benefit of every reasonable intendment which may be drawn from the allegations in favor of the sufficiency of the pleading.¹³

Objection after judgment, for the first time, to the sufficiency of a pleading, it will be liberally construed,¹⁴ more liberally than when attacked by demurrer before trial,¹⁵ and this rule applies in the case of a default judgment.¹⁶

Objection on appeal, being made for the first time, challenging the sufficiency of the complaint to state a cause of action, the pleading will be liberally construed,¹⁷ and not narrowly scanned for defects in stating a cause of action.¹⁸ After trial on the theory that fraud was alleged by the complaint, a challenge to the sufficiency of the complaint to charge fraud, made for the first time on appeal, the complaint having alleged that the defendant, as vendor, and his agent, made representations as to the quantity of land sold; that they pointed out to plaintiff the boundaries of the land; that the vendor and his agent knew, or ought to have known, that the deed did not convey all the land pointed out, and that plaintiff did not know the facts prior to a survey of the tract of land sold, was held to state facts presenting the issue of fraud.¹⁹

¹¹ As to attack after judgment, see footnotes 13-15, this section.

¹² *Brooks v. McCabe*, 39 Wash. 62, 80 Pac. 1004.

¹³ *Prescott v. Puget Sound Bridge & Dredging Co.*, 31 Wash. 177, 77 Pac. 772.

¹⁴ *Montesano, City of, v. Blair*, 12 Wash. 188, 40 Pac. 731; *Rainey v. Smith*, 56 Wash. 604, 106 Pac. 160.

¹⁵ *Carey v. Hayes*, 41 Wash. 580, 84 Pac. 581.

¹⁶ *Rainey v. Smith*, 56 Wash. 604, 106 Pac. 160.

¹⁷ *Bishop v. Averill*, 17 Wash. 209, 49 Pac. 237, 50 Pac. 1024.

¹⁸ *Jensen v. Kohler*, 93 Wash. 8, 159 Pac. 978.

¹⁹ *Arrowsmith v. Nelson*, 73 Wash. 658, 132 Pac. 743.

§ 776. IN WYOMING. The Wyoming statute providing that the allegations in a pleading shall be liberally construed, with a view to substantial justice between the parties,¹ abrogates the common-law rule requiring a pleading to be most strongly construed against the pleader.²

Objection on trial to the introduction of evidence, on the ground that the pleading does not state facts sufficient to constitute a cause of action or of defense, the pleading will be liberally construed, and every intendment must be drawn in its favor.³

On appeal or writ of error, a challenge for the first time to the sufficiency of a pleading as insufficient to state a cause of action or of defense, the pleading will be most liberally construed⁴ to sustain the pleading, if possible,⁵ by indulging every legal intendment, and the pleading will always be upheld in those cases in which the necessary facts are fairly to be inferred from the allegations;⁶ the objection will be sustained in those cases, only, in which there is an entire omission of a material fact, or a total failure to state a cause of action or of defense.⁷ Thus, in an action to recover damages for the alleged wrongful diversion of water, a complaint alleging that the defendant diverted more water than it was entitled

¹ Wyo. Rev. Stats., § 2483.

² *Cone v. Iverson*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

³ *Reynolds v. Morton*, 23 Wyo. 528, 154 Pac. 325.

⁴ *Frontier Supply Co. v. Loveland*, 15 Wyo. 313, 88 Pac. 651; *Rawlins, City of, v. Jungquist*, 16 Wyo. 403, 94 Pac. 464, 96 Pac. 144; *Reynolds v. Morton*, 23 Wyo. 528, 154 Pac. 325; *Van Buskirk v. Red Buttes Land & Live Stock Co.*, 24 Wyo. 183, 156 Pac. 1122, 160 Pac. 387.

⁵ *Rawlins, City of, v. Jungquist*.

16 Wyo. 403, 94 Pac. 464, 96 Pac. 144; *Reynolds v. Morton*, 23 Wyo. 528, 154 Pac. 325; *Van Buskirk v. Red Buttes Land & Live Stock Co.*, 24 Wyo. 183, 156 Pac. 1122, 160 Pac. 387.

⁶ *Grover Irr. Ditch Co. v. Lovella Ditch Co.*, 21 Wyo. 204, 230, Ann. Cas. 1915D, 1207, 131 Pac. 43; *Van Buskirk v. Red Buttes Land & Live Stock Co.*, 24 Wyo. 183, 156 Pac. 1122, 160 Pac. 387.

⁷ *Rawlins, City of, v. Jungquist*, 16 Wyo. 403, 94 Pac. 464, 96 Pac.

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to under its preferred priorities; that during the irrigation season of the period complained of there was a sufficient supply of water in the streams to supply the admitted prior appropriations of the defendant, so as to leave at any time a supply of water in the streams which the plaintiff would be legally entitled to use; and further alleging the capacity of the streams, that the defendant had abandoned some of its prior appropriations, and that it had caused and permitted all the water in the said streams to be backed up in dams, pools, and depressions of ground on its own premises and premises under its control, thereby causing the water to be wasted, and depriving plaintiff of his share and appropriation thereof. The court construed the allegation as to the "capacity of the streams" to refer to and be an allegation as to the quantity of water ordinarily flowing in the streams, thereby showing and alleging that the water of the streams was much greater than the defendant's prior appropriations; and that, as against an attack first made on appeal, the complaint contained sufficient averments to state a good cause of action.⁸

⁸ Van Buskirk v. Red Buttes Land & Live Stock Co., 24 Wyo. 183, 156 Pac. 1122, 160 Pac. 387.

CHAPTER III.

SUBSCRIPTION AND VERIFICATION OF PLEADINGS.

- § 777. Subscription of pleadings—In general.
- § 778. ——— Sufficiency of.
- § 779. Verification—In California.
- § 780. ——— Complaint based upon written instrument.
- § 781. ——— Defense founded upon written instrument.
- § 782. ——— Petition for perpetuation of testimony.
- § 783. ——— Construction of statute.
- § 784. ——— As to when answer may be verified.
- § 785. ——— By whom pleadings may be verified—In general.
- § 786. ——— ——— By one of several parties.
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- § 788. ——— ——— Agent having possession of note sued on,
etc.
- § 789. ——— ——— By attorney—In general.
- § 790. ——— ——— Grounds of belief.
- § 791. ——— ——— Client absent from county, etc.
- § 792. ——— ——— By person not a party, agent, etc.
- § 793. ——— ——— By guardian or his attorney.
- § 794. ——— ——— By officer or manager of corporation.
- § 795. ——— Before whom verification may be taken.
- § 796. ——— Verification on information or belief.
- § 797. ——— Defective verification.
- § 798. ——— Sufficiency of verification.
- § 799. ——— Omission to verify—Effect.
- § 800. ——— Subscription of verification.
- § 801. ——— Waiver of objection to verification.

§ 777. SUBSCRIPTION OF PLEADINGS—IN GENERAL. The procedural codes in the various jurisdictions which have adopted the reformed method of procedure, contain varying provisions as to the subscription of the pleadings by the party or his attorney. In California it is required that every pleading must be subscribed by the party or

his attorney.¹ Under the provisions of the Colorado Civil Code,² requiring every pleading to be signed by the party or his attorney, the provision is held to be mandatory.³ The Idaho Code⁴ requires all pleadings in the district courts and the supreme court to be signed by a resident attorney.⁵ In Arkansas the omission to sign a pleading is held to be a mere formal defect or clerical mistake, which the court should allow to be corrected on motion;⁶ and in California where the court has allowed attorney to insert omitted name to complaint after answer filed, defendant is not entitled, as of right, to answer or demur anew.⁷ In Kansas, where an attorney omits to sign a pleading, it is not improper for the court to allow him to amend by signing the same even after judgment.⁸ Under the New York Code of Civil Procedure,⁹ a pleading must be signed by the attorney for the party,¹⁰ with his office or postoffice address.¹¹

Objection pleading not signed or subscribed by the party or by his attorney, as required by the statute, where not taken in the trial court, is deemed to have been waived.¹²

§ 778. — SUFFICIENCY OF. The signature of or subscription to a pleading, within the meaning of the procedural codes, signifies the putting down in writing, by

¹ Kerr's Cyc. Cal. Code Civ. Proc., 2d ed., § 446; Consolidated Supp. 1906-1913, p. 1461.

² Colo. Civ. Code, § 61.

³ Perras v. Denver & R. G. R. Co., 5 Colo. App. 21, 36 Pac. 637.

⁴ Idaho Rev. Codes, § 4198.

⁵ Nobach v. Scott, 20 Idaho 558, 119 Pac. 295; Richards v. Richards, 24 Idaho 87, 132 Pac. 576.

⁶ Coleman v. Bercher, 94 Ark. 345, 126 S. W. 1070; Simpson & Webb Furniture Co. v. Moore, 94 Ark. 347, 126 S. W. 1074.

⁷ Smith v. Dorn, 96 Cal. 73, 76, 30 Pac. 1024.

⁸ Yurann v. Hamilton, 82 Kan. 528, 108 Pac. 822.

⁹ §§ 417, 421, 520.

¹⁰ German - American Bank v. Champlin, 11 N. Y. Civ. Proc. Rep. 452.

¹¹ German - American Bank v. Champlin, N. Y. Civ. Proc. Rep. 452; Allen v. Bagnell, 12 N. Y. Civ. Proc. Rep. 426; Drucker v. McCallum, 21 Abb. N. C. 209.

¹² Hellings v. Wright, 29 Cal. App. 649, 156 Pac. 365.

the party, or by his attorney, his respective name at the end of the instrument,¹ by himself,² or by another authorized thereto by him,³ to attest its validity.⁴ Hence it has been held that the name of an attorney printed at the end of the pleading, is not a signature or subscription within the meaning of the statute,⁵—and the same is thought to be true of a signature by typewriter merely,⁶ although it has been held that signing attorney's name by using a rubber stamp, does not render the signature insufficient;⁷ but it has been said that a judgment recovered on a pleading upon which the name of the attorney was printed instead of written, is not for that reason void or erroneous.⁸ In California a party to an action, having an attorney of record, can not sign his own pleadings, so long as such attorney is not displaced or dismissed.⁹ In an action against a county, the pleading by the county must be signed by the regular counsel appointed by law to represent such county, under the Oregon code,¹⁰ and where signed by any other attorney will not be sufficient, because the court will not presume, where it does not otherwise appear, that such other counsel had authority in the premises.¹¹ Signature by

¹ See *Ashbrook v. Roberts*, 82 Ky. 298; *Knox's Estate*, Appeal of, 131 Pa. St. 220, 17 Am. St. Rep. 798, 6 L. R. A. 353, 18 Atl. 1021; *Wade v. State*, 22 Tex. App. 256, 2 S. W. 594.

² *Mills v. Howland*, 2 N. D. 30, 49 N. W. 413.

Signature of counsel first appearing signed at foot of pleading in connection with name of associate counsel, court will not consider whether such signature is genuine or put there by associate counsel without authority. — *Wilson v. Cleaveland*, 30 Cal. 192, 200.

³ *Sinnott v. Louisville & N. R. Co.*, 104 Tenn. 233, 53 S. W. 836.

⁴ *Wade v. State*, 22 Tex. App. 256, 2 S. W. 594.

⁵ *Nightingale v. Oregon Cent. R. Co.*, 2 Sawy. 338, Fed. Cas. No. 10264.

⁶ See, however, *Ardery v. Smith*, 35 Ind. App. 94, 73 N. E. 840.

⁷ *Streff v. Colteaux*, 64 Ill. App. 179.

⁸ *Hancock v. Bowman*, 49 Cal. 413.

⁹ *Crane v. Crane*, 121 Cal. 99, 53 Pac. 433.

¹⁰ Ore. Civ. Code, § 79.

¹¹ *Moreland v. Marion County*, 1 N. Y. Week. Dig. 326, 8 Chicago Leg. News. 25, Fed. Cas. No. 9794.

one not an attorney at law, or, being an attorney at law, is not the attorney for the party for that particular case, is not sufficient.¹² A signature by a party's attorneys, without describing themselves as his attorneys, has been held to be a sufficient signature within the statute;¹³ so, also, is a signature merely by the firm name of such attorneys, omitting the Christian names of the members of the firm;¹⁴ and it has been said that a signature by the initials of the firm name,—e. g., C. & K. for Plff.,—is a sufficient signature, the firm of attorneys being the attorneys of record for the plaintiff.¹⁵ A pleading not signed at the end, but having upon the outside, or backing, below the title of the cause, the name of the attorney for the party, this does not constitute a signing within the meaning of the statute.¹⁶

Signature to a verification attached to and following a pleading, without other or further signature, has been held to be a sufficient signature of the pleading by the party, within the meaning of the statute;¹⁷ and the same has been held respecting a signature to an affidavit similarly attached to and following the pleading, wherein it is recited that the affiant has read the pleading, knows the contents thereof, and that it is true.¹⁸

§ 779. VERIFICATION—IN CALIFORNIA. The procedural codes in the various jurisdictions contain provisions requiring and regulating the sufficiency of verification of pleadings, by the party, or by another who is qualified so to do by reason of his knowledge of the facts in the

¹² Dixey v. Pollock, 8 Cal. 570.

Compare: Wood v. Holden, 45

¹³ Merrell v. Lattimore, 12 Rob. (La.) 138.

Me. 374.

¹⁴ Zimmerman v. Wead, 18 Ill. 304.

¹⁷ Graff's Estate, In re, 86 Neb. 535, 125 N. W. 1091; Hubbell v. Livingston, 1 N. Y. Code Rep. 63;

¹⁵ Nave v. First Nat. Bank, 87 Ind. 204.

Barrett v. Joslynn, 9 Misc. (N. Y.) 407, 29 N. Y. Supp. 1070; Klein v.

¹⁶ Ashbrook v. Roberts, 82 Ky. 298; Schiller v. Maltbie, 11 N. Y. Civ. Proc. Rep. 304.

Turner, 66 Ore. 369, 133 Pac. 625. ¹⁸ Johnson v. Johnson, 1 Walk. Ch. (Mich.) 309.

cause. These provisions are not identical in language, requirements and effect, but are all essentially similar; the peculiarities of language, requirements and sufficiency in the various jurisdictions can not be entered into in detail in this place, and what is herein said should be read with the particular statute. The California procedural code provides that where the complaint is verified, or when the state, or any officer of the state, in his official capacity, is plaintiff, the answer must be verified,¹ unless an admission of the truth of the complaint might subject the party to a criminal prosecution, or unless an officer of the state, in his official capacity, is defendant. In all cases of a verification of a pleading, the affidavit of the party must state that the same is true of his own knowledge,² except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true;³ and where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county where the attorney has his office, or from some cause unable to verify it, or the facts are within the knowledge of his attorney⁴ or other person verifying the same.⁵

¹ *Brooks v. Chilton*, 6 Cal. 640, 642; *Drum v. Whitting*, 9 Cal. 422; *Stockton, City of, v. Dahl*, 66 Cal. 377, 5 Pac. 682.

Form of stipulation annexed to answer extending time in which to verify, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. 1, p. 161, Form No. 111.

² Form of verification where all facts stated positively, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. 1, p. 158, Form 104.

Form of verification by relator in action brought by the state by its attorney-general, see *Jury's Ad-*

Judicated Forms of Pleading and Practice, vol. 1, p. 160, Form No. 110.

³ Form of verification on information and belief, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. 1, p. 157, Form No. 103.

⁴ Form of verification by attorney familiar with the facts, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. 1, p. 159, Form No. 106.

⁵ Form of verification by agent, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. 1, p. 158, Form No. 105.

*When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties.*⁶

*When a corporation is a party, the verification may be made by any officer thereof.*⁷

*Complaint need not be verified when the state, or any county thereof, or any officer of the state, or of any county thereof, in his official capacity, is plaintiff.*⁸

§ 780. — COMPLAINT BASED UPON WRITTEN INSTRUMENT. Under the California procedural code, when an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified.¹

§ 781. — DEFENSE FOUNDED UPON WRITTEN INSTRUMENT. The California procedural code provides that when the defense to an action is founded upon a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted unless the plain-

⁶ Form of verification by district attorney in action commenced by a county, and where the chairman of the board of supervisors of such county refuses to verify, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. 1, p. 159, Form No. 107.

⁷ Form of verification by officer of a corporation, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. 1, p. 160, Form No. 108.

Form of verification by attorney for nonresident corporation, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. 1, p. 160, Form No. 109.

⁸ *Kerr's Cyc. Cal. Code Civ. Proc.*, 2d ed., § 446; *Consolidated Supp.* 1906-1913, p. 1461; see *Close, Matter of*, 106 Cal. 574, 39 Pac. 1067; *United States v. Soup*, 2 Idaho 459, 21 Pac. 656.

Form of motion to strike pleadings from the files for failure to verify or for defective verification, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. 1, p. 161, Form No. 112.

As to nature, scope and effect of verification, see 13 L. R. A. 267.

¹ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 447.

tiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant.¹

§ 782. — PETITION FOR PERPETUATION OF TESTIMONY. A petition on application to the court in proceedings to perpetuate testimony must be verified by the oath of the applicant.¹

§ 783. — CONSTRUCTION OF STATUTE. The object of the procedural codes and of statutes requiring verification of pleadings is to insure and secure good faith in the averments in pleadings by parties to actions or proceedings of a civil nature;¹ and such statutes apply to pleadings in actions and proceedings of a civil nature only.² Thus, a claim of a lien, under the mechanics' lien law, for lumber furnished for building purposes, is not such a "pleading" as is required to be verified under the provisions of the statute relating to the verification of pleadings in actions and proceedings of a civil nature.³ The statutes regulating verification of pleadings relate to and govern all kinds or classes of verification, by whomsoever made, and do not relate to and govern verifications on information and belief only.⁴ Like the signature or subscription to a pleading,⁵ a verification is a purely personal matter, by which the party makes the averments in the pleading his own;⁶ and an averment in the complaint, in reference to the verification, that the

¹ Kerr's Cyc. Cal. Code Civ. Proc., § 448.

¹ Kerr's Cyc. Cal. Code Civ. Proc., § 2084.

¹ Patterson v. Ely, 19 Cal. 28; Silcox v. Lang, 78 Cal. 118, 122, 20 Pac. 297.

² Parke & Lacy Co. v. Inter Nos Oil & Devel. Co., 147 Cal. 490, 82 Pac. 51.

³ Parke & Lacy Co. v. Inter Nos

Oil & Devel. Co., 147 Cal. 490, 82 Pac. 51.

⁴ Christopher v. Condodge, 128 Cal. 581, 584, 61 Pac. 174.

As to verification on information and belief, see, ante, § 779, footnote 3; post, § 796.

⁵ As to subscription or signature to a complaint, see, ante, §§ 777, 778.

⁶ Johnson v. Powers, 65 Cal. 179, 3 Pac. 625.

plaintiff filed "his verified claim," is, in substance, an allegation that it was verified by himself, and is sufficient after answer to admit in proof the claim as actually filed, if so verified.⁷ In the California statute⁸ there is nothing absolutely requiring the complaint to be verified, with the exception of complaints in actions for an injunction;⁹ in actions brought against steamers, boats and vessels;¹⁰ in proceedings for the disbarment of attorneys;¹¹ in applications for the voluntary dissolution of corporations;¹² in habeas corpus,¹³ and in such other actions as are specially provided for. The safer and better practice, however, is to verify the complaint in all cases, and if the complaint is verified, the answer, as above stated, shall be verified also, except when an admission of the truth of the complaint might subject the party to prosecution for felony or misdemeanor,¹⁴—except in those cases in which such prosecution is barred by the statute of limitations;¹⁵ and the code or statutory requirement that when any pleading is verified all subsequent pleadings, except demurrers, must be verified, is mandatory.¹⁶ When the court could not see from the pleadings themselves that the admission of the allegations in the complaint would subject the defendant to a criminal prosecution, he may show that fact by affidavit;¹⁷ and whenever the defendant would be excused

⁷ Bohn v. Wilson, 53 Ore. 490, 101 Pac. 202. See, also, Pilz v. Killingsworth, 20 Ore. 432, 26 Pac. 305; Matthiesen v. Arata, 32 Ore. 342, 67 Am. St. Rep. 535, 50 Pac. 1015.

⁸ See, ante, § 779.

⁹ Kerr's Cyc. Cal. Code Civ. Proc., 2d ed., § 527; Consolidated Supp. 1906-1913, p. 1496.

¹⁰ Id., § 815.

¹¹ Id., § 291.

¹² Id., § 1229.

¹³ Walpole, Ex parte, 84 Cal.

584, 24 Pac. 308; Buckley, Ex parte, 105 Cal. 123, 38 Pac. 686.

¹⁴ Wheeler v. Dixon, 14 How. Pr. (N. Y.) 151; Anable v. Anable, 24 How. Pr. (N. Y.) 92.

¹⁵ Henry v. Bank of Salina, 1 N. Y. 83, 3 Denio 593, 1 How. App. Cas. 173, 3 How. Pr. 183.

¹⁶ Perras v. Denver & R. G. R. Co., 5 Colo. App. 21, 36 Pac. 637; Alford v. McCormac, 90 N. C. 151; Crompton v. Crow, 2 Utah 245.

¹⁷ Blaisdell v. Raymond, 5 Abb. Pr. (N. S.) 144; Scovill v. New, 12

from testifying as a witness to the truth of any matter denied by the answer, he need not verify the answer.¹⁸ But defendant is not excused from verifying his answer when the complaint charges him with fraud in making the assignment.¹⁹ Such verification should be by the affidavit of the party, and if he be absent from the county, then by his attorney, or other person having a knowledge of the facts.²⁰ A verification is sufficient if it conform substantially to the statute.²¹

§ 784. — AS TO WHEN ANSWER MAY BE VERIFIED. The procedural codes and statutes governing the verification of pleadings contemplate that all pleadings, required to be verified, shall be so verified before they are filed; but this provision is not mandatory, and if the verification is omitted,¹ or defective,² the trial court may allow the same to be inserted or amended;³ and a defendant may

How. Pr. (N. Y.) 319; *Lynch v. Todd*, 13 How. Pr. (N. Y.) 547; *Wheeler v. Dixon*, 14 How. Pr. (N. Y.) 151; *Anable v. Anable*, 24 How. Pr. (N. Y.) 92; *Moloney v. Dows*, 2 Hilt. (N. Y.) 247.

¹⁸ *Drum v. Whiting*, 9 Cal. 422; *People ex rel. Hackley v. Kelly*, 24 N. Y. 74, 34 How. Pr. 369; *Clapper v. Fitzpatrick*, 1 N. Y. Code Rep. 69, 3 How. Pr. 314; *Blaisdell v. Raymond*, 5 Abb. Pr. (N. Y.) 144; *Tappan, In re*, 9 How. Pr. (N. Y.) 394; *Moloney v. Dows*, 2 Hilt. (N. Y.) 247.

¹⁹ *Wolcott v. Winston*, 8 Abb. Pr. (N. Y.) 422.

²⁰ See, ante, § 779; post, §§ 787, 791; also, *Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621; *Ely v. Frisbie*, 17 Cal. 250; *Patterson v. Ely*, 19 Cal. 28.

²¹ *Ely v. Frisbie*, 17 Cal. 250.

As to sufficiency of verification, see, post, § 798.

¹ See, post, § 799.

² See, post, § 797.

³ KAN.—*Gaylord v. Stebbins*, 4 Kan. 42; *Hargrave v. Woolf*, 34 Kan. 101, 8 Pac. 192; *Chinberg v. Gale Sulky Harrow Mfg. Co.*, 38 Kan. 228, 16 Pac. 462. MO.—*Anderson v. Hance*, 49 Mo. 159. N. Y.—*Bragg v. Bickford*, 4 How. Pr. 21; *Jones v. United States Slate Co.*, 16 How. Pr. 129. OHIO—*Mace v. Thorn*, 2 Ohio Dec. 289; *Boyles v. Hoyt*, 2 Ohio Dec. 376.

Contra: *Stevens v. White*, 2 Ohio Dec. 107 (where the verification attached to a complaint is a mere nullity, its deficiency can not be cured by amendment).

Diligence and a showing essential to right.—*Foote v. Sprague*, 13 Kan. 155.

Reply not verified application to amend by verifying same comes too late after hearing and report of referee, and on motion to set the report aside.—*Moore v. Emmert*, 21 Kan. 1.

be permitted to verify his answer at any time before or during trial, where the complaint is verified.⁴ Refusal to permit an answer to be verified more than six months after it had been filed, and after depositions had been taken in the cause, and striking it from the files without notice, was held to be an abuse of judicial discretion and erroneous.⁵ Where by mistake a copy of an answer, instead of the verified answer, was filed, and the parties proceeded to trial without objection being taken to the answer because it was not verified, such objection being interposed at the close of the trial, it was held to be error in the trial court to refuse to permit the defendant to file the verified complaint.⁶

*If defendant omit to verify his answer to a verified complaint, the plaintiff may proceed as if no answer was filed.*⁷ Inability of counsel to obtain defendant's verification in time can not avail in resisting a motion to strike out.⁸

§ 785. — BY WHOM PLEADINGS MAY BE VERIFIED—IN GENERAL. The procedural codes and statutes providing for and regulating the verification of pleadings, contemplate that the verification shall be made by the party, or by one of the parties,¹ filing such pleading; but it is not mandatory that the verification shall be by the party or

⁴ Angler v. Masterson, 6 Cal. 61; Arrington v. Tupper, 10 Cal. 464; Lattimer v. Ryan, 20 Cal. 628.

⁵ Lattimer v. Ryan, 20 Cal. 628, 633.

⁶ Arrington v. Tupper, 10 Cal. 464; Abbott v. Douglass, 28 Cal. 297.

⁷ See, ante, § 779; also, McCullough v. Clark, 41 Cal. 298; Littlejohn v. Munn, 3 Pal. Ch. (N. Y.) 280; Stout v. Curran, 7 How. Pr.

(N. Y.) 36; Hull v. Ball, 14 How. Pr. (N. Y.) 305; Moloney v. Dows, 2 Hilt. (N. Y.) 247.

Effect of written instrument — embodied in complaint upon requirement as to verification.—See, ante, § 780; also Corcoran v. Doll, 32 Cal. 83.

—Embodied in answer, as to effect of, see, ante, § 781.

⁸ Drum v. Whiting, 9 Cal. 422.

¹ Verification by co-party, see, post, § 786.

a co-party; it may be by an agent,² the attorney³ or representative,⁴ managing agent,⁵ or by an entirely outside party familiar with the facts.⁶

§ 786. ——— BY ONE OF SEVERAL PARTIES. Where there is but one party plaintiff or defendant, and the record recites that his pleading was verified, it will be presumed to have been verified by such party personally;¹ and where there are two or more persons parties plaintiff or defendant, the verification may be by any one of the co-parties who has the requisite qualifications to make it.² But in certain cases it has been held that where the action is joint, the parties should unite in the verification.³ Thus, in an action against husband and wife, where her interest is separate, the answer must be verified by both, if relied on as the answer of both.⁴

§ 787. ——— BY AGENT OR ATTORNEY—IN GENERAL. It has already been pointed out that a verification may be made by a person other than the party filing the pleading, where such person can show the proper qualifications therefor;¹ thus, in an action for unlawful detainer, a complaint is sufficiently verified by an agent of the plaintiff, where it appears from the verification that the matters set forth in the complaint are within the personal

² Verification by agent, see, post, §§ 787, 788.

³ Verification by attorney, see, post, §§ 789-791, 793.

⁴ Verification by guardian and like fiduciary representative, see, post, § 793.

⁵ Verification by managing agent, see, post, § 794.

⁶ Verification by person not party to suit, nor an agent, etc., see, post, § 792.

¹ Roberts v. Eldred, 73 Cal. 394, 15 Pac. 16.

² Patterson v. Ely, 19 Cal. 28, 40; Claiborne v. Castle, 93 Cal. 30.

33, 32 Pac. 807; Butterfield v. Graves, 138 Cal. 155, 158, 71 Pac. 510.

³ Alfred v. Watkins, 1 N. Y. Code Rep. (N. S.) 343, 1 Edm. Sel. Cas. 369; Hull v. Ball, 14 How. Pr. (N. Y.) 305; Wendt v. Peyser, 14 Hun (N. Y.) 114; Andrews v. Storms, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 609; Gray v. Kendall, 18 N. Y. Super. Ct. Rep. (5 Bosw.) 666, 10 Abb. Pr. 66.

⁴ Youngs v. Seely, 12 How. Pr. (N. Y.) 395; Reed v. Butler, 2 Hill. (N. Y.) 589.

¹ See, ante, § 785.

knowledge of such agent.² But where a verification is made by the agent or attorney of the party, or by another person cognizant of the facts set forth in the pleading, such verification must set forth the reason why it is not made by the party himself, under the Oklahoma statute³ and elsewhere. And this rule applies to any party to the suit, regardless of whether a natural person or a corporation. Where the verification gives no reason why it is not signed and sworn to by the proper officer, it is held to be no verification at all.⁴ In some jurisdictions a verification by an agent must disclose the nature of the agency;⁵ but it is not necessary to verify by the agent who knows most about the matter.⁶

§ 788. ——— AGENT HAVING POSSESSION OF NOTE SUED ON, ETC. A verification by an agent of the party to the action which states that the notes sued on are in possession of deponent, sufficiently avers that deponent was agent of the plaintiff,¹ and authorized to verify the complaint,² whether plaintiff was within the county or not.³ But in California, possession of the written instrument or obligation upon which the suit is based does not authorize the attorney or agent to verify the complaint. The verification of a pleading by an attorney, which shows no inability of the party to make the verification, must state directly that the facts verified are within the knowledge of the attorney. He can not verify upon information and belief in such case, nor is it sufficient to state that the facts are more fully known to him than to the party he repre-

² Newman v. Bird, 60 Cal. 372, 375.

³ Wilson's Rev. & Ann. Stats. 1903, § 4318.

⁴ Garfield County Commrs. v. Isenberg, 10 Okla. 380, 61 Pac. 1068; Chicago, R. I. & P. R. Co. v. Mitchell (Okla.), 101 Pac. 850.

⁵ Boston Locomotive Works v. Wright, 15 How. Pr. (N. Y.) 253.

⁶ Drevert v. Appsert, 2 Abb. Pr. (N. Y.) 165.

¹ Myers v. Gerrits, 13 Abb. Pr. (N. Y.) 106.

² Id.

³ Wheeler v. Chesley, 14 Abb. Pr. (N. Y.) 441.

sents.⁴ We have already seen that where the complaint in an action of unlawful detainer was verified by an agent of the plaintiff, who stated in the affidavit that the facts stated in the complaint were within the knowledge of affiant, it was held that the complaint was properly verified.⁵

§ 789. ——— BY ATTORNEY—IN GENERAL. The attorney for a party to an action can verify the pleadings in two cases, only, as follows: (1) Where the party is absent from the county where the attorney resides, or from some other sufficient cause is unable to verify it; and (2) when all the material allegations of the pleading are within the personal knowledge of the attorney.¹ Where a pleading is verified by the attorney of the party, such verification must set forth the reason why the verification was not made by the party filing the pleading.² Where an attorney can verify only because the facts are within his personal knowledge, it necessarily follows that he must state in the affidavit of verification that the facts are within his personal knowledge, and can not verify on information or belief.³ Where a verification by the attorney instead of the party set out that the affiant had personal knowledge as to the truth of one of the statements in the pleading,—an answer,—because the plaintiff had admitted its truth on a former trial, and as to another matter set out, because the court had determined in another proceeding

⁴ *Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297; *Beyer v. Wilson*, 46 Hun (N. Y.) 397.

⁵ See, ante, § 787, footnote 2.

¹ *Wheeler v. Chesley*, 14 Abb. Pr. (N. Y.) 441; *Mason v. Brown*, 6 How. Pr. (N. Y.) 481, 484; *Treadwell v. Fassett*, 10 How. Pr. (N. Y.) 184.

As to form and sufficiency of verification by attorney, see, post, § 798.

² *Kerr's Cyc. Cal. Code Civ. Proc.*, 2d ed., § 446; *Consolidated Supp.* 1906-1913, p. 1461.

³ *Silcox v. Lang*, 78 Cal. 118, 122, 20 Pac. 297; *Columbia Screw Co. v. Warner Lock Co.*, 138 Cal. 445, 447, 71 Pac. 498; *Aiken v. Franz*, 2 Kan. App. 75, 43 Pac. 306.

As to verification on information or belief, see, post, § 796.

that it was true, the verification was held not to be sufficient to show that the facts were within the personal knowledge of the attorney;⁴ although a simple general allegation that the affiant has knowledge regarding the statements made in the pleading, and that they are true, is sufficient.⁵ And where the affidavit of verification by an attorney did not show that the facts were within his knowledge, but merely that the facts were more fully known to him than to his client, the verification was held to be insufficient.⁶

§ 790. ———— GROUNDS OF BELIEF. Where an attorney or agent verifies a complaint, the verification, under the Oregon procedural code,¹ and other codes, must state the grounds of belief, and the reasons why it was not made by the party.² The grounds of knowledge or belief need not be set forth if all the allegations in the pleading are made in the positive form.³ Under the California procedural code it is not necessary that the attorney or agent should state his grounds of belief, in the first class of cases in which he can verify, as set out in the preceding section. And when a verification of a pleading by an attorney states that the parties for whom he is

⁴ Searle v. Richardson, 67 Iowa 170, 25 N. W. 113.

⁵ Rausch v. Moore, 48 Iowa 611; Zoe v. Nichols, 51 Iowa 330, 1 N. W. 664.

⁶ Silcox v. Lang, 78 Cal. 118, 122, 20 Pac. 297.

As to sufficient verification by attorney, see Myers v. Gerrits, 13 Abb. Pr. (N. Y.) 106; Wheeler v. Chesley, 14 Abb. Pr. (N. Y.) 441; Stannard v. Mattice, 7 How. Pr. (N. Y.) 4; Ross v. Longmuir, 24 How. Pr. (N. Y.) 49, 15 Abb. Pr. 326; Gourney v. Wersuland, 10 N. Y. Super. Ct. Rep. (3 Duer) 613; Frisk v. Reigelman, 75 Wis.

499, 43 N. W. 1117, 44 N. W. 766.

As to insufficient verification by attorney, see Fitch v. Bigelow, 3 N. Y. Code Rep. 216, 5 How. Pr. 237; Soutter v. Mather, 14 Abb. Pr. (N. Y.) 440; Tibballs v. Selfridge, 12 How. Pr. (N. Y.) 64; Meads v. Gleason, 13 How. Pr. (N. Y.) 313; Bank of Maine v. Buel, 14 How. Pr. (N. Y.) 311.

¹ Ore. Code, § 79.

² Meads v. Gleason, 13 How. Pr. (N. Y.) 309; People v. Allen, 11 How. Pr. (N. Y.) 334; Boston Locomotive Works v. Wright, 15 How. Pr. (N. Y.) 253.

³ Ross v. Longmuir, 24 How. Pr. (N. Y.) 49, 15 Abb. Pr. 326.

attorney are absent from the county, it states a sufficient statutory reason for the verification by their attorney, and no additional force would be given to the verification by adding that it is for that reason that the verification is made by the attorney.⁴

§ 791. ——— CLIENT ABSENT FROM COUNTY, ETC. In those cases in which an attorney is authorized to verify a pleading, under the first class of cases above enumerated,¹ because his client is not within the county where the attorney resides, or for other sufficient cause, a verification made by the attorney is good, though he have no personal knowledge of the truth of the allegations,² even though it appears that the client has a resident agent through whom the attorney has obtained his information,³ the verification being sufficient to meet all the requirements where the affidavit states that the attorney is a resident of the county and that the party he represents is absent from the county.⁴

§ 792. ——— BY PERSON NOT A PARTY, AGENT, ETC. A person not a party to an action, and not the attorney or agent of the party pleading, may verify a pleading where his affidavit of verification shows (1) that the matters are within his personal knowledge,¹ and (2) a sufficient statutory reason why the verification is not made by the party pleading.² Thus, a verification of a

⁴ Stephens v. Parrish, 83 Cal. 561, 23 Pac. 797.

¹ See, ante, § 789.

² Humphreys v. McCall, 9 Cal. 59, 70 Am. Dec. 621; Ely v. Frisbie, 17 Cal. 250; Patterson v. Ely, 19 Cal. 28; Dixwell v. Woodsworth, 2 N. Y. Code Rep. 1; Drevert v. Appsert, 2 Abb. Pr. (N. Y.) 165; Myers v. Gerrits, 13 Abb. Pr. (N. Y.) 106; Stannard v. Mattice, 7 How. Pr. (N. Y.) 4; Roscoe v. Maison, 7 How. Pr. (N. Y.) 121; Smith v. Rosenthal, 11 How. Pr.

(N. Y.) 442; Wilkin v. Gilman, 13 How. Pr. (N. Y.) 225; People v. Allen, 14 How. Pr. (N. Y.) 334; Le Fevre v. Latson, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 650; Gourney v. Wersuland, 10 N. Y. Super. Ct. Rep. (3 Duer) 613.

³ Drevert v. Appsert, 2 Abb. Pr. (N. Y.) 165.

⁴ Stephens v. Parrish, 83 Cal. 561, 23 Pac. 797.

¹ See Hotchkiss, Matter of, 58 Cal. 39.

² Pence v. Durbin, 1 Idaho 550.

complaint, made by a person not a party to the action, which sets forth that affiant is the assignor of the claim sued on, and for that reason is better informed as to the facts thereof than is the plaintiff; that he has read the complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true, fully meets the requirements of the California procedural code,³—sufficiently shows that the facts are within affiant's personal knowledge, and sufficiently states the reason why the verification was not made by the plaintiff in the action,⁴ it not being necessary, in such a verification, to specify in formal characterization the reasons why the verification is not made by the plaintiff, where such reasons can be gathered from all the facts stated in the affidavit of verification, when read in the light of the pleading.⁵

§ 793. ——— BY GUARDIAN OR HIS ATTORNEY. A person acting in a fiduciary capacity¹ bringing or defending an action for the benefit of his cestui que trust, or a person authorized by statute to sue,² may verify the pleadings in such action. Thus, a guardian, or the attorney for the guardian, of an infant plaintiff may verify.³ In an action by an infant appearing by a guardian ad litem, the complaint may properly be verified by the guardian, and he need not do so as the agent or attorney for the infant, but may do so as the plaintiff.⁴

§ 794. ——— BY OFFICER OR MANAGER OF CORPORATION. We have already seen that the procedural code of California provides,—and similar provisions are found

³ See, ante, § 779.

⁴ Bittleston Law & Collection Agency v. Howard, 172 Cal. 357, 156 Pac. 515.

⁵ Id.

¹ See, ante, §§ 588, 596, 611, 612.

² See, ante, §§ 587, 602.

³ Hill v. Thacter, 2 N. Y. Code Rep. 3, 3 How. Pr. 407; Anable v. Anable, 24 How. Pr. (N. Y.) 92; Rogers v. Cruger, 7 Johns. (N. Y.) 557.

⁴ Anable v. Anable, 24 How. Pr. (N. Y.) 92.

in other procedural codes and statutes,—that where a corporation is a party to an action, the verification to the pleadings may be made by an officer thereof;¹ and the courts have held that a managing agent is an “officer” of the corporation within the meaning of such statutes,² on the theory that an officer of the corporation verifying the pleadings in an action merely acts as an agent thereof.³ This provision in the procedural codes and statutes regulating the verification of pleadings by corporations is held not to be exclusive, but permissive, only, and does not prevent an attorney or other person qualified from making the verification in a proper case.⁴ The clause in the California procedural code is qualified by the preceding part of the section, and is not a limitation that the officers of the corporation, only, can verify the pleadings thereof.⁵ In Colorado⁶ there is a special provision as to the manner in which the pleadings of a corporation are to be verified, including among the persons competent to verify the attorney for the corporation, and the sufficiency of the verification of such a pleading is to be tested by this special provision, and not by the general provision⁷ regulating verifications.⁸

Grounds of belief and source of knowledge, it has been said, need not be stated in the verification of pleadings of a corporation by an officer or agent thereof, because it is the verification of the corporation;⁹ but this doctrine has

¹ See, ante, § 779.

² *Glaubenskle v. Hamburg & American Packet Co.*, 9 Abb. Pr. (N. Y.) 104; *Best v. British & American Mortgage Co.*, 131 N. C. 70, 42 S. E. 456.

³ *Robinson v. Ecuador Devel. Co.*, 32 Misc. (N. Y.) 106, 65 N. Y. Supp. 427. See *American Soda Fountain Co. v. Stolzenbach*, 75 N. J. L. 721, 16 L. R. A. (N. S.) 703, 68 Atl. 1078.

See note 16 L. R. A. (N. S.) 703.

⁴ As to verification by person not a party, other than an agent or attorney for the party filing the pleading, see, ante, § 792.

⁵ *Bittleston Law and Collection Agency v. Howard*, 172 Cal. 357, 156 Pac. 515.

⁶ Colo. Civil Code § 62.

⁷ *Id.*, § 61.

⁸ *Tulloch v. Belleville Pump & Skein Works*, 17 Colo. 579, 31 Pac. 229.

⁹ *Glaubenskle v. Hamburg &*

not gone unchallenged,¹⁰ and the later cases are to the effect that, since an officer or agent of a corporation is not to be deemed a party to the suit, within the meaning of the procedural codes and statutes, his affidavit of verification must set forth the grounds of his belief as to all matters not stated on his knowledge, although it is not necessary for him to state why he was not made a party;¹¹ but where the verification is by the attorney of the corporation, it is sufficient for his affidavit of verification to deny any knowledge or information to form a belief as to each and every allegation in the complaint.¹² In the case of an affidavit or verification by an officer of a corporation, it is not sufficient to set out his individual belief; it must set out the belief of the corporation,¹³ except as to such matters as are stated on his personal knowledge.

§ 795. — BEFORE WHOM VERIFICATION MAY BE TAKEN. Where there is no statute or rule of court prohibiting verification of a pleading before counsel in a case, verification in this manner is permissible.¹ A notary public, who is an attorney's clerk, may administer an oath to verify a pleading prepared by the attorney.² A county recorder may take a verification to a pleading, he being authorized by statute to take an affidavit to be used in

American Packet Co., 9 Abb. Pr. (N. Y.) 104; American Insulator Co. v. Bankers' & Merchants' Tel. Co., 13 Daly (N. Y.) 200, 2 How. Pr. N. S. 120, 7 N. Y. Civ. Proc. Rep. 443.

¹⁰ See Van Horne v. Montgomery, 5 How. Pr. (N. Y.) 238; Anable v. Anable, 24 How. Pr. (N. Y.) 92.

¹¹ Robinson v. Ecuador Devel. Co., 32 Misc. (N. Y.) 106, 65 N. Y. Supp. 427.

¹² American Audit Co. v. Indus-

trial Federation Co., 84 App. Div. (N. Y.) 304, 82 N. Y. Supp. 642.

¹³ See Quigley v. Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

¹ Hankins v. Helms, 12 Ariz. 178, 100 Pac. 460; Kuhland v. Sedgwick, 17 Cal. 123; Reavis v. Cowell, 56 Cal. 588; Young v. Young, 18 Minn. 90.

Compare: Warner v. Warner, 11 Kan. 121; Peyser v. McCormack, 51 How. Pr. (N. Y.) 205; Meade v. Thorne, 2 Ohio Dec. 289.

² Schuyler Nat. Bank v. Bollong, 24 Neb. 821, 40 N. W. 411.

any court of justice;³ and a district attorney has authority to take a verification to a pleading.⁴

§ 796. — VERIFICATION ON INFORMATION OR BELIEF. A pleading can not be verified on information and belief, merely, in those cases in which the facts pleaded are presumptively within the knowledge of the party pleading or verifying;¹ but where the pleading contains no allegations on information and belief, an addition to a positive affidavit of verification of the words, “except as to matters therein stated to be on information and belief,” does not qualify the positive character of the verification as to the truth of the allegations of the pleading.² Adding to a positive verification that a pleading is true to affiant’s knowledge the words, “and belief,” do not render the verification defective; the words “and belief” may be treated as surplusage.³ The rule as to positiveness of verification applies to corporations and their officers as well as to natural persons;⁴ but the rule does not apply to the denial of the sufficiency of a recorded claim of lien.⁵

³ *Pfeiffer v. Riehn*, 12 Cal. 643, 648.

⁴ *Hall v. Smith*, 128 Cal. 413, 420, 60 Pac. 1032.

¹ *Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453, 472; *McCormick v. Bailey*, 10 Cal. 230, 232; *Ord v. Steamer Uncle Sam, The*, 13 Cal. 369, 371; *Davanay v. Eggenhoff*, 43 Cal. 395, 397; *Walker v. Buffandeau*, 63 Cal. 312, 314; *Hanna v. Barker*, 6 Colo. 303, 308; *Mills’ Estate, In re*, 40 Ore. 424, 433, 67 Pac. 107.

Compare: *Vassault v. Austin*, 32 Cal. 597, 607; *Hogman v. Williams*, 88 Cal. 146, 150, 25 Pac. 1111.

Sufficiency can not be questioned for first time in appellate court.—*Walker v. Buffandeau*, 63 Cal. 312, 314.

² *Christopher v. Coudogorge*, 128 Cal. 581, 584, 61 Pac. 174; *Bittleston Land & Collection Agency*, 172 Cal. 357, 156 Pac. 515.

³ *Seattle Coal & Transp. Co. v. Thomas*, 57 Cal. 197, 200.

“On his information and belief” or “According to his information and belief,” may be treated in the same manner under like circumstance.—*Roussin v. Stewart*, 32 Cal. 208, 211.

⁴ *Loveland v. Garner*, 74 Cal. 298, 15 Pac. 844.

⁵ *Hagman v. Williams*, 88 Cal. 146, 25 Pac. 1111.

Upon information "or" belief is the provision of the California procedural code, which is a peculiarity probably restricted to that statute only; the usual form is information "and" belief. There can be no reason why the language of the verification should not follow the language of the pleading verified. In such case the verification should use the word "or" or "and" to correspond with the pleading. The word "belief" is to be taken in its ordinary sense, and means the actual conclusion of the party drawn from information. Positive knowledge and mere belief can not exist together.⁶ If the pleader avers matters "upon information and belief," or "upon information or belief," the verification will be sufficient if his affidavit states that as to the matters thus alleged he believes the pleading to be true.⁷ Where the pleader states nothing on information or belief, the verification need not mention the same.⁸ If, however, there are such allegations in the pleading, an allegation that "the same are true according to the best of his knowledge and belief," is insufficient,⁹ and so, also, is a verification alleging that "the same is substantially true," etc., insufficient, because containing a qualification that is a material departure from the requirements of the code.¹⁰ Where the affidavit of a defendant to his answer states that the matters set forth in the foregoing answer are true, except as to those matters therein stated on information or belief, and as to those matters that he believes them to be true, it is a sufficient verification, and it is not necessary that he should state in the affidavit that he has heard the answer read, and knows the con-

⁶ *Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 61.

⁷ *Patterson v. Ely*, 19 Cal. 28; *Kirk v. Rhoads*, 46 Cal. 403.

⁸ *Patterson v. Ely*, 19 Cal. 28; *Kelly v. Kelly*, 18 Nev. 49; 1 Pac. 194; 51 Am. Rep. 732 omits this practice point; *Ross v. Longmuir*,

24 How. Pr. (N. Y.) 49; 15 Abb. Pr. 326; *Kinkaid v. Kipp*, 8 N. Y. Super. Ct. Rep. (1 Duer) 692;

⁹ *Standter v. Parmlee*, 10 Iowa 23; *Van Horne v. Montgomery*, 5 How. Pr. (N. Y.) 238.

¹⁰ *Waggoner v. Brown*, 8 How. Pr. (N. Y.) 212.

tents thereof.¹¹ A verification which omits the words, "of his own knowledge," has been held to be sufficient in some cases,¹² but adjudged to be fatally defective in others,¹³ under the New York procedural code, which requires the verification to be "to the knowledge" of the affiant.¹⁴

§ 797. — DEFECTIVE VERIFICATION. A defect in verification of a complaint, even when apparent upon its face, does not render the complaint irregular, because a verification is no part of a pleading.¹ It only operates to relieve the defendant from the obligation to verify his answer. This, however, can not be in cases where the complaint is required to be sworn to. If such defect be latent, the remedy is by motion,² and not by demur-

¹¹ *Fleming v. Wells*, 65 Cal. 336, 4 Pac. 197.

¹² *Southworth v. Curtis*, 1 N. Y. Code Rep. N. S. 412, 6 How. Pr. 271. See *Arata v. Tellurium Gold & Silver Min. Co.*, 65 Cal. 340, 4 Pac. 195 (verification to claim of mechanics' lien).

¹³ *Williams v. Riel*, 12 N. Y. Super Ct. Rep. (5 Duer) 601, 11 How. Pr. 374; *Tibballs v. Selfridge*, 12 How. Pr. (N. Y.) 64; *Sexauer v. Bowen*, 3 Daly (N. Y.) 405, sub nom. *Sexaner v. Bowen*, 10 Abb. Pr. N. S. (N. Y.) 335.

¹⁴ N. Y. Code of Civil Procedure § 157.

¹ *George v. McAvoy*, 1 N. Y. Code Rep. N. S. 318, 6 How. Pr. 200; *Williams v. Riel*, 12 N. Y. Super. Ct. Rep. (5 Duer) 601, 11 How. Pr. 374.

² *Gilmore v. Hempstead*, 4 How. Pr. (N. Y.) 153; *Champ v. Kendrick*, 130 Ind. 549, 30 N. E. 787; *Warner v. Warner*, 11 Kan. 121.

Pleading not properly verified will be stricken out on motion.—

1 Code Pl. and Pr.—71

ALA.—*Gaston v. State*, 88 Ala. 457, 7 So. 340; *Davis v. Louisville & N. R. Co.*, 108 Ala. 660, 18 So. 687. ARK.—*Sullivant v. Reardon*, 5 Ark. (5 Pike) 140; *Sevier v. Wilson*, 8 Ark. (3 Eng.) 496; *Sanger v. Sumner*, 13 Ark. (8 Eng.) 280; *Fowler v. Bender*, 18 Ark. 262. CAL.—*Drum v. Whiting*, 9 Cal. 422. COLO.—*Nichols v. Jones*, 14 Colo. 61, 23 Pac. 89. FLA.—*Ropes v. Snyder-Harris-Bassett Co.*, 37 Fla. 529, 20 So. 535. ILL.—*Brainwood v. Weiller*, 89 Ill. 606. IND.—*Barber v. Summers*, 5 Blackf. 339; *Ferrand v. Walker*, 5 Blackf. 424; *Indianapolis, P. & C. R. Co. v. Summers*, 28 Ind. 521. MISS.—*Prewitt v. Bennett*, 15 Miss. (7 Smed. & M.) 101. NEB.—*Fritz v. Barnes*, 6 Neb. 435. N. Y.—*Richmond v. Tallmadge*, 16 Johns. 307; *Tibballs v. Selfridge*, 12 How. Pr. 64; See, however, *Strauss v. Parker*, 9 How. Pr. 342. WIS.—*Hackes v. Katzenstein*, 26 Wis. 363.

Inability to obtain party's verifi-

rer,³ because the verification is not part of the pleading.

Objection to verification must be taken in the trial court, and at the proper time, or it will be deemed waived;⁴ the objection can not be taken the first time on appeal.⁵ Thus, an objection to the want of verification of a complaint, where verification is required by statute, must be taken either before answer or with the answer;

cation in time may furnish sufficient ground for an extension of time in which to plead; but can not be urged as a ground for refusing a motion to strike from the files for want of a verification.—*Drum v. Whiting*, 9 Cal. 422.

Fraudulently serving answer purporting to be verified when original was not verified, may be stricken from the files.—*Hackes v. Katzenstein*, 26 Wis. 363.

Pleading a nullity need not be stricken from the files.—*Hamilton v. Congers*, 28 Ga. 276.

Unverified portion of answer, where part is verified and part not, will be stricken out on motion.—*Nichols v. Jones*, 14 Colo. 61, 23 Pac. 89.

³ *Seattle Coal & Transp. Co. v. Thomas*, 57 Cal. 197; *Pudney v. Burkhardt*, 62 Ind. 179; *Champ v. Kendrick*, 130 Ind. 549, 30 N. E. 787; *Ingraham v. Arnold*, 24 Ky. (1 J. J. Marsh.) 406.

Demurrer waives verification.—*Ingraham v. Arnold*, 24 Ky. (1 J. J. Marsh.) 406.

⁴ CAL.—*Greenfield v. Gunnell, The*, 6 Cal. 67; *McCullough v. Clark*, 41 Cal. 298; *San Francisco, City, etc., v. Itsell*, 80 Cal. 57, 22 Pac. 74. IND.—*Toledo Agricultural Works v. Works*, 70 Ind. 253; *Lange v. Dammier*, 119 Ind. 567, 21 N. E. 749. IOWA—*Smith v.*

Powell, 55 Iowa 215, 7 N. W. 602. KAN.—*Boston Loan & Trust Co. v. Organ*, 53 Kan. 386, 36 Pac. 733. KY.—*Gordon v. Phelps*, 29 Ky. (6 J. J. Marsh.) 406; *Meador v. Turpin*, 61 Ky. (4 Metc.) 93; *Butler v. Church of Immaculate Conception*, 77 Ky. (14 Bush) 549. MASS.—*Butler v. Butler*, 162 Mass. 524, 39 N. E. 182. MINN.—*Hayward v. Grant*, 13 Minn. 165, 97 Am. Dec. 278. N. Y.—*Schwarz v. Oppold*, 7 Daly 121, affirmed 74 N. Y. 307, 56 How. Pr. 156. ORE.—*State v. Chadwick*, 10 Ore. 423. PA.—*Casporus v. Jones*, 7 Pa. St. 120. WIS.—*Kirby v. Corning*, 54 Wis. 599, 12 N. W. 69.

After submission to jury on evidence and verdict, objection complaint not verified comes too late.—*Meador v. Turpin*, 61 Ky. (4 Metc.) 93.

⁵ ARK.—*Payne v. Flournoy*, 29 Ark. 500. IND.—*Sutherland v. Hankins*, 56 Ind. 343. KAN.—*Bronson v. Ashlock*, 2 Kan. App. 255, 41 Pac. 1068; *Bishop v. McHenry*, 4 Kan. App. 525, 44 Pac. 1016. KY.—*Saddler v. Glover*, 40 Ky. (1 B. Mon.) 53. MO.—*Beck & Pauli Lithographing Co. v. Obert*, 54 Mo. App. 240. TENN.—*Kelth v. Raglan*, 41 Tenn. (1 Cold.) 474. W. VA.—*Arnold v. Slaughter*, 36 W. Va. 589, 18 S. E. 250. WIS.—*Orton v. Scofield*, 61 Wis. 382, 21 N. W. 261.

it comes too late thereafter, for the filing of the answer waives the defect.⁶ So, also, the objections to the verification to the complaint, that it was not authenticated by the seal of the notary; that there was no venue to the affidavit; that there was no evidence that the officer was a notary public, etc., being technical, should be taken in the court below, and can not be raised for the first time in the Supreme Court.⁷ And where a plaintiff goes to trial on the merits without objecting to the verification of an answer, he can not take the objection for the first time on appeal, but will be held to have waived all objection for want of a verification, or because of a defective verification, by failing to object thereto at the proper time.⁸

§ 798. — SUFFICIENCY OF VERIFICATION. To be sufficient, a verification must substantially comply with the requirements of the statute regulating verifications, whether such verification be by the party¹ or a co-party,² by an agent,³ by an attorney,⁴ or by a person not a party to the action or an agent or attorney of the party to the action.⁵ Where the verification is made by the attorney of the party because the facts are within his personal knowledge, such verification should be substantially in the form required by the statute where the verification is made by the party;⁶ and the provision of the statute requiring that a verification by an attorney shall state the

⁶ CAL.—Greenfield v. Gunnell, The, 6 Cal. 67; People v. Reis, 76 Cal. 268, 276, 18 Pac. 309; San Luis Water Co. v. Estrada, 117 Cal. 168, 172, 48 Pac. 1075. IDAHO—Pence v. Durbin, 1 Idaho 550. N. Y.—Laimbeer v. Allen, 2 N. Y. Code Rep. 15, 4 N. Y. Super Ct. Rep. (2 Sandf.) 648. ORE.—State v. Chadwick, 10 Ore. 423, 427.

⁷ Kuhland v. Sedgwick, 17 Cal. 123.

⁸ McCullough v. Clark, 41 Cal.

298, 302; San Francisco, City of, etc., v. Itsell, 80 Cal. 57, 60, 22 Pac. 74; Nichols v. Jones, 14 Colo. 61, 23 Pac. 89; Speer v. Craig, 16 Colo. 478, 27 Pac. 891.

¹ See, ante, § 785.

² See, ante, § 786.

³ See, ante, §§ 787, 788.

⁴ See, ante, §§ 789-791.

⁵ See, ante, § 792.

⁶ Colorado Springs Rapid Transit R. Co. v. Albrecht, 22 Colo. App. 201, 123 Pac. 957.

reason why such verification is not made by the party or one of the co-parties to the action, is mandatory.⁷ The provision as to verification on information or belief,⁸ has the effect of putting that part of the pleading made on information and belief in opposition to that which is verified positively,⁹ and a positive statement as to the matter pleaded on knowledge and a belief as to the truth of the matter pleaded on information and belief, is sufficient.¹⁰ A statement that the allegations in a pleading are true, is tantamount to stating that the pleading is true, and is sufficient.¹¹ It has been said that adding to a positive statement as to the truth of a pleading the words, "as he verily believes," does not destroy the sufficiency of the verification;¹² and a positive verification to the effect that "the foregoing pleading is true to affiant's knowledge," is a sufficient verification, without the affidavit reciting that affiant has read, or has heard read, the pleading and knows the contents thereof.¹³

§ 799. — OMISSION TO VERIFY—EFFECT. It has already been pointed out that the object in requiring the pleadings in an action to be verified is to secure good faith in the averments of the parties to the action,¹ and it has been said that a verification in accordance with the requirements of the statute is necessary to give validity to the acts performed in pursuance of such action or proceeding.² We have also already discussed the effect of

⁷ Colorado Springs Rapid Transit R. Co., v. Albrecht, 22 Colo. App. 201, 123 Pac. 957.

⁸ See, ante, § 796.

⁹ See Fleming v. Wells, 65 Cal. 336, 339, 4 Pac. 197.

¹⁰ Ely v. Frisbie, 17 Cal. 250, 257; Patterson v. Ely, 19 Cal. 28, 39, 40; Kirk v. Rhoads, 46 Cal. 399, 404; Perras v. Denver & R. G. R. Co., 5 Colo. App. 21, 36 Pac. 637.

¹¹ Fleming v. Wells, 65 Cal. 336, 339, 4 Pac. 197.

¹² Cady v. Walsh, 11 Wash. 124, 39 Pac. 375.

As to effect of adding qualifying words to positive verification, see, ante, § 796.

¹³ Patterson v. Ely, 19 Cal. 28, 38, 39; Fleming v. Wells, 65 Cal. 336, 339, 4 Pac. 197.

¹ See, ante, § 783.

² Wall v. Miner, 130 Cal. 27, 40,

defective verifications.³ The complaint being verified the answer must be, but the complaint not being verified the answer need not be; yet the filing of a verified answer to an unverified complaint does not detract from the force and effect of the statements in the answer, it simply adds thereto the sanctity of an oath; it is not a matter of exception.⁴ Where an answer is required to be verified, each defense relied upon in such an answer should be verified, and any unverified portion may be struck out.⁵ A verified answer denying performance, on the part of the plaintiff, in accordance with the terms of the contract, meets the requirements of the statute, and the answer can not be treated as a nullity, or as a sham answer.⁶ An answer need not be reverified in those cases in which it is merely corrected to conform to a rule of court in regard to the preparation as relates to the form—e. g. numbering the pages thereof;⁷ and in a condemnation proceeding under the power of eminent domain by a county, the plaintiff being neither a state nor an officer of the state acting in his official capacity, the answer is not required to be verified.⁸

Allegations of complaint admitted, usually, where the complaint is verified and the answer filed thereto is unverified. Thus, where a complaint alleges the plaintiff's appointment and authority as an agent, and is not denied

62 Pac. 386; *Perras v. Denver & R. G. R. Co.*, 5 Colo. App. 21, 36 Pac. 637.

³ See, ante, § 797.

⁴ *Porter v. Birchard*, 1 Ariz. 87, 25 Pac. 530.

⁵ *Nichols v. Jones*, 14 Colo. 61, 23 Pac. 89. See *Drum v. Whiting*, 9 Cal. 422.

Insufficiency of unverified answer to a verified complaint can not be tested in the Supreme Court on appeal, where the plaintiff took exception for that reason in the lower court and the court

ruled against him, and he does not appeal from that decision.—*Morgan v. Southern Pac. Co.*, 95 Cal. 510, 520, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603.

⁶ *Ghirardelli v. McDermott*, 22 Cal. 539.

As to disregarding sham answer on motion for judgment, see footnote 23, this section.

⁷ *Buell v. Beckwith*, 59 Cal. 480.

⁸ *Montgomery County v. Cushing*, 83 Cal. 507, 515, 23 Pac. 700. See *San Francisco, City and County of, v. Itsell*, 80 Cal. 60, 22 Pac. 74.

in this regard by verified answer, evidence is inadmissible on the trial to dispute such allegation.⁹ But it is not the rule of pleading that all the allegations in a verified complaint are admitted by an unverified answer.¹⁰ Thus, an allegation in a complaint that the plaintiff had full authority to act for himself, is not taken to be true because undenied by a verified answer;¹¹ and an allegation that A is the legal guardian of B is not admitted by an unverified denial.¹² The remedy of the plaintiff, where the answer is unverified, is to move to strike out and for judgment upon the pleadings for want of an answer;¹³ because if the cause goes to trial, and the cause is heard and determined upon the issues purporting to have been raised by the pleadings of the parties, without a previous objection on the part of the plaintiff to lack of verification of the defendant's answer, the defect will be deemed to have been waived.¹⁴

Written instrument the subject-matter of the action, being set out in the complaint, or copy thereof annexed thereto, the genuineness and due execution of such instrument is deemed admitted, unless the defendant's answer denying the same is duly verified,¹⁵ where the written instrument is one contemplated by the statute. The admission thus involved has been said to go to the manual execution of the instrument only; but by the later decisions in the supreme court of Missouri, this includes an admission to the extent of both signing and delivering the instrument pleaded.¹⁶ Thus, where a written release

⁹ Ft. Smith & W. R. Co. v. Salsberger, 38 Okla. 40, 131 Pac. 1078.

¹⁰ Hill v. Merle & Co., 29 Cal. App. 473, 156 Pac. 981.

¹¹ Washbon v. State Bank, 86 Kan. 468, 121 Pac. 515.

¹² Tate v. Stone, 35 Okla. 369, 130 Pac. 296.

¹³ See footnotes 20-25, this section, and text going therewith.

¹⁴ Hill v. Merle & Co., 29 Cal. App. 473, 156 Pac. 981.

As to waiver of defects and objections, see, post, § 801.

¹⁵ See, ante, § 780.

¹⁶ Hart v. Harrison Wire Co., 91 Mo. 414, 4 S. W. 123; Hahs v. Cape Girardeau & C. R. Co. (Mo. App.), 126 S. W. 524, 527. See: State to the use of Early v.

is properly pleaded in the answer, and the plaintiff fails to deny its genuineness under a verified denial, such release can not, on the trial, be proved to have been a forgery, as its genuineness was by the plaintiff's act admitted.¹⁷ And where the complaint declares upon a promissory note, a copy of which is attached thereto, a failure by defendant to verify his plea of non est factum admits the execution of the note.¹⁸ The verification of a complaint in an action on a promissory note necessitates a verified answer.¹⁹

Proper practice on unverified answer where the complaint is verified, or the action is founded upon a written instrument which is set out in the complaint or a copy thereof annexed thereto, is to move, (1) to strike the answer from the files;²⁰ (2) for judgment on the pleadings, without a preliminary motion to strike from the files;²¹ or (3) for judgment for want of an answer,²² because an unverified answer to a verified complaint may be treated as sham, on a motion for judgment.²³ Thus, it has been held that an answer in an action regarding a

Chamberlain, 54 Mo. 338; Smith v. Rambaugh, 21 Mo. App. 390; McGill v. Wallace, 22 Mo. App. 675; Thomas v. Guaranty Fund Life Assoc., 73 Mo. App. 371; Bates v. Scheik, 47 Mo. App. 642; Love v. Central Life Ins. Co., 92 Mo. App. 192; Campbell v. Harrington, 93 Mo. App. 315; Johnson v. Sovereign Camp of W., 119 Mo. App. 98, 95 S. W. 951.

¹⁷ Hahs v. Cape Girardeau & C. R. Co. (Mo. App.), 126 S. W. 524, 527.

¹⁸ Bick v. Yates, 137 Mo. App. 268, 117 S. W. 650.

¹⁹ Brooks v. Chilton, 6 Cal. 640, 642.

²⁰ Drum v. Whiting, 9 Cal. 422; Johnson v. Dixon Farms Co., 29 Cal. App. 52, 155 Pac. 134.

See, also, authorities in footnote 21, this section.

²¹ Brittleston Law & Collection Agency v. Howard, 172 Cal. 357, 156 Pac. 515; Johnson v. Dixon Farms Co., 29 Cal. App. 52, 155 Pac. 134.

See, also, authorities in next footnote.

²² Hearst v. Hart, 83 Cal. 507, 515, 60 Pac. 846. See McCullough v. Clark, 41 Cal. 298, 302; Consolidated Music Co. v. Morrison, 30 Cal. App. 303, 158 Pac. 342; Speer v. Craig, 16 Colo. 478, 27 Pac. 891.

See, also, authorities in footnotes 19 and 20, this section.

²³ Consolidated Music Co. v. Morrison, 30 Cal. App. 303, 158 Pac. 342.

street-assessment, being required to be verified, where it is not verified, the plaintiff is entitled to judgment, even though he has introduced some evidence, and yet not enough to prove all the material allegations of the complaint;²⁴ but this holding is thought to be open to serious objections under the well-established doctrine that objections for want of verification, not taken at the trial, and at the proper time and in the regular manner, are to be deemed waived.²⁵

§ 800. — SUBSCRIPTION OF VERIFICATION. A verification must be subscribed by the party making it;¹ and we have already seen² that, where the verification is by the party or his attorney, the subscription of the verification is a sufficient subscription of the pleading.³ A verified answer is defective if neither the answer nor the verification is subscribed.⁴ The want of a proper subscription to a verification, however, or a subscription by an improper party, is a mere irregularity, which must be objected to at the proper time, and is waived by pleading over.⁵

§ 801. — WAIVER OF OBJECTION TO VERIFICATION. In those cases in which a pleading is required by law to be verified, an objection that the verification has been omitted or is insufficient for any reason, must be taken timely and in the appropriate manner, otherwise the objection is deemed to have been waived.¹ In the case a

²⁴ *Stockton, City of, v. Dohl*, 67 Cal. 377, 5 Pac. 682.

²⁵ See, post, § 800. See, also, *Hill v. Merle & Co.*, 29 Cal. App. 473, 156 Pac. 981.

¹ *Laimbeer v. Allen*, 4 N. Y. Super Ct. Rep. (2 Sandf.) 648, 2 N. Y. Code Rep. 15.

² See, ante, § 778.

³ *Hubbell v. Livingston*, 1 N. Y. Code Rep. 63; *Barrett v. Joslynn*, 9 Misc. (N. Y.) 407, 29 N. Y. Supp. 1070.

⁴ *Laimbeer v. Allen*, 4 N. Y. Super. Ct. Rep. (2 Sandf.) 648, 2 N. Y. Code Rep. 15.

⁵ See *Greenfield v. Gunnell, The*, 6 Cal. 67; *Delafield v. Illinois*, 2 Hill (N. Y.) 159, 161, 26 Wend. 192, affirming 8 Pal. Ch. (N. Y.) 527; *State v. Chadwick*, 10 Ore. 423; *Bell v. Mobile & O. R. Co.*, 71 U. S. (4 Wall.) 598, 18 L. Ed. 338. *Stanton v. Embrey*, 93 U. S. 553, 23 L. Ed. 985.

¹ *Hill v. Merle & Co.*, 29 Cal. App. 473, 156 Pac. 981.

complaint is not verified which should be thus authenticated, or the verification thereto is for any reason insufficient, the objection must be taken before or at the time of answering, otherwise it will be deemed to be waived.² We have already seen that by pleading over, an objection to the signature, or for want of a signature, to the verification, is waived.³ The waiver of objection because of a want of verification, or because of insufficient verification to an answer, does not waive the effect of the verification of the complaint, and an unverified general denial will be insufficient.⁴ If the complaint be verified by one of the plaintiff's attorneys, but no reason why it is not verified by the parties is stated, as required by the statute, such defect is waived when the defendants make no objection to the verification in the court below, and file an answer duly verified as to some of the defenses, and not verified as to others.⁵ And if a plaintiff goes to trial without objection for the want of a verification of the answer, he can not raise the question after a decision is rendered against him.⁶

² *Greenfield v. Gunnell, The*, 6 Cal. 67; *People v. Reis*, 76 Cal. 216, 268, 18 Pac. 309; *San Luis Water Co. v. Estrada*, 117 Cal. 168, 172, 48 Pac. 1075.

State v. Chadwick, 10 Ore. 423, 427.

³ See, ante, § 800, footnote 5.

⁴ *Harney v. Porter*, 62 Cal. 511.

⁵ *Nichols v. Jones*, 14 Colo. 61, 23 Pac. 89.

⁶ *San Francisco, City of, etc., v. Itsell*, 80 Cal. 57, 22 Pac. 74; *Lange v. Dammier*, 119 Ind. 567, 21 N. E. 749.

CHAPTER IV.

FORMAL PARTS OF PLEADING.

- § 802. In general.
- § 803. Caption or title.
- § 804. ——— No part of complaint.
- § 805. ——— Omissions—Mistaken designations.
- § 806. ——— Name of court.
- § 807. ——— Name of county—Laying venue or place of trial.
- § 808. ——— Name of parties—In general.
- § 809. ——— ——— Mistake in.
- § 810. ——— ——— Known and unknown parties.
- § 811. ——— ——— Titles to be avoided.

§ 802. IN GENERAL. While the procedural codes have abolished all former forms of actions, both at law and in equity, a certain fundamental formality is still retained in the drafting of the pleadings, in promotion of the due and regular and speedy transaction of business, and to facilitate administering justice between parties litigant. These formalities may be designated as:

- I. The Caption or Title;
- II. The Commencement;
- III. The Pleading proper, that is, the statement of the facts constituting the cause of action or defense, in plain and ordinary and concise language, and without repetition;
- IV. The Prayer, that is, the demand of the relief to which the party deems the facts entitle him;
- V. The Subscription, and
- VI. The Verification, in those cases in which authentication is required by law.

The Subscription and the Verification have been sufficiently treated in the preceding chapter.

§ 803. CAPTION OR TITLE. The first subdivision of the

formal parts of a pleading is the caption or title, and consists of:

1. The name of the state and county in which the action is brought;
2. The name of the court;
3. The names of the parties, plaintiff and defendant;¹ and
4. The venue or place of trial.²

The full Christian name of each party should be given, and where there are more than one plaintiff, or more than one defendant, the name of each such plaintiff and each such defendant must be set out in the caption or title to the complaint, to the process or summons,³ in each subsequent pleading, and in all records of the court.⁴

Latin abbreviation “et al.” or its English equivalent “and another,” or “and others,” never should be used in the caption or title in a pleading, process or court record, not being sufficient because no notice will be given to and of those persons whose names are not set out, and where defendants, such persons will not be bound by the process or proceedings in the cause. Thus, in the case of a bill of exceptions,⁵ or in the case of a petition on appeal

¹ Kerr’s Cyc. Cal. Code Civ. Proc. § 426, subd. 1.

² As to laying venue or place of trial, see, post, § 807.

³ Summons giving name of first defendant followed by “et al.,” or by “and others,” is not sufficient to designate the names of such other defendants. The most that can be said of such a summons is that it indicates there are other defendants who are not named.—Lyman v. Milton, 44 Cal. 630, 633.

⁴ Entry of clerk not setting down the full names of all the parties, but merely reciting that in the case of A against B et al., the jury was sworn to try the

issues on a day designated, can not be accepted as indicating and recording that the jury was sworn to try the issues as against any of the other defendants.—Breidenthal v. McKenna, 14 Pa. St. 160.

As to setting out names of parties, see further, post, §§ 808-810.

⁵ Original files and papers do not constitute a bill of exceptions, until settled and certified as required by law.—Brabham v. Custer County, 3 Neb. Unof. 801, 92 N. W. 989.

Neither can they be looked to to correct errors in the transcript and bill of exceptions.—School

or in error, the names of all the parties excepting, where more than one party excepts, and the names of all the parties appealing or taking the case up on error, where two or more parties join, must be set out in full. Where the first name only is given, followed by “et al.” or “and others,” the person whose name is set out alone can be deemed to have excepted,⁶ or to have appealed or taken the cause to the higher court on error.⁷ A petition on appeal or in error is a new and independent proceeding before a distinct court, and the Latin abbreviation “et al.,” or the English equivalent “and another” or “and others,” not being a sufficient designation of the persons not named, although such unnamed persons were parties to the action before the lower court.⁸

§ 804. — NO PART OF COMPLAINT. The caption or title to a complaint is not a part of the complaint itself, unless referred to and made such by appropriate reference in the body of the complaint.¹ Thus, in an action on firm notes executed in the firm name, where the caption or title to the complaint set out the names of the persons composing the firm, and alleged that they were partners doing business under a designated firm name, but in the body of the complaint, running through six counts, the term “defendant,” in the singular number was used, stating that the “defendant” had not paid the notes sued on or any one or any part of them, no reference being made in the body

District v. Cooper, 44 Neb. 714, 717, 62 N. W. 1084; Brabham v. Custer County, 3 Neb. Unof. 801, 92 N. W. 989.

⁶ Swift v. Thomas, 101 Ga. 89, 28 S. E. 618; Brabham v. Custer County, 3 Neb. Unof. 801, 92 N. W. 989.

⁷ Mutual Building & Loan Inv. Co. v. Dickinson, 112 Ga. 469; Brabham v. Custer County, 3 Neb. Unof. 801, 92 N. W. 989.

⁸ Cameron v. Sheppard, 71 Ga. 781; Hutts v. Martin, 141 Ind. 701, 41 N. E. 329; Brabham v. Custer County, 3 Neb. Unof. 801, 92 N. W. 989; Kellett v. Rathbun, 4 Pal. Ch. (N. Y.) 102; Miller v. McKenzie, 77 U. S. (10 Wall.) 582, 19 L. Ed. 1043.

¹ Hawley Brothers Hardware Co. v. Brownstone, 123 Cal. 643, 56 Pac. 468.

of the complaint to the caption or title of the cause; the court held, on demurrer to the complaint for ambiguity and insufficiency, that the complaint did not show who the "defendant" was, and that the caption or title, not being referred to in the body of the complaint, could not be looked to to ascertain who the defendant was.²

§ 805. — OMISSIONS—MISTAKEN DESIGNATIONS. It has been said that an omission from the caption or title of a complaint of any of the things required to be contained therein, as above enumerated,¹ constitutes an irregularity² which may cause the complaint to be set aside or the action dismissed on motion.³ But in California a mistake in designating the particulars required to be set out in the caption or title to a complaint will be disregarded at every stage of the action, under the procedural code,⁴ where, in the opinion of the trial court, such mistaken designation does not affect any substantial rights of the parties.⁵

§ 806. — NAME OF COURT. Every complaint, and every subsequent pleading for that matter, should be entitled in the proper court;¹ but we have already seen that, in California—and the same is true in most if not all of the states having the reformed procedure—a mistake in the designation of the court will be disregarded, where no substantial interests of the parties are affected thereby,² e. g., where a complaint in an action for an injunction is entitled "In the Supreme Court of" designating a county in California, there being no such

² Id.¹ See, ante, § 803.²¹ Van Santv. Eq. Pr. 203.³ Williams v. Wilkinson, 1 N. Y. Code Rep. (N. S.) 20, 5 How. Pr. 257.⁴ Kerr's Cyc. Cal. Code Civ. Proc., § 475.⁵ Fil Kl, Ex parte, 79 Cal. 584, 586, 21 Pac. 974.¹ Kerr's Cyc. Cal. Code Civ. Proc., § 426.² See, ante, § 805, footnote 4.

court,³ and the summons being entitled in the proper court.⁴

Inferior or local court being the forum in which an action is brought, the full title of the court should be given, e. g., "The City Court of Sacramento," and the like. Where the summons and complaint are served together, the omission of the title of the court from the complaint is a technical irregularity which can not injure the defendant;⁵ but if neither the summons nor complaint names any court, no cognizance of the action need be taken.⁶ This is especially true under the New York Code of Civil Procedure, and under those procedural codes founded upon the New York code,—e. g., North Dakota, Oklahoma, South Dakota—and the authorities cited arose under and relate to those codes and the practice thereunder. This practice differs somewhat from the practice under the California procedural code, and the procedural codes found in other jurisdictions, in the manner of the commencement of an action and the service of process; but they are nevertheless authority upon the general propositions set out. A paper denominated a "synopsis of petition," with the names of the parties, but without the name of either the court or state, and not directed to be filed as a paper in any particular court, was held not

³ Fil Kl, Ex parte, 79 Cal. 584, 586, 21 Pac. 974.

Compare: Morgan v. Small, 33 Iowa 118, in which a complaint was entitled as in the Circuit Court, and filed in that court, and afterwards transferred to the district court. The court used language,—though not necessary to the decision arrived at,—indicating that the complaint could not be regarded as a complaint in the district court, because it did not contain the name of that court. The language of the court being: "No complaint being on file in the

district court at the time of serving the notice on the defendant to appear therein, or at any time subsequently, the action was to be deemed discontinued."

⁴ Fil Kl, Ex parte, 79 Cal. 584, 586, 21 Pac. 974.

⁵ See McLeran v. Morgan, 27 Ark. 148; Van Amee v. Bank of Troy, 8 Barb. (N. Y.) 312, 5 How. Pr. 161; Van Bethuysen v. Stevens, 14 How. Pr. (N. Y.) 70; Robinson v. Peru Plow & Wheel Works, 1 Okla. 140, 31 Pac. 988.

⁶ Ward v. Stringham, 1 N. Y. Code Rep. 118.

to be sufficient to invoke the jurisdiction of the court, not being deemed a complaint.⁷

§ 807. — NAME OF COUNTY—LAYING VENUE OR PLACE OF TRIAL. The venue or place of trial of an action has been fully discussed in previous chapters,¹ as has also the subject of changing the place of trial.² It has been said that a complaint is irregular unless it states the place of trial;³ and that in such case it must be amended or stricken out.⁴ It can not be cured by reference to the summons,⁵ yet it may be amended, but only on payment of defendant's costs.⁶ Omission to lay venue or place of trial may be availed of on demurrer.⁷ As a venue is technically necessary to every traversable fact, when it is once properly laid, all matters following refer to it.⁸ The proper mode in all cases will be to lay the venue in the title, but it has been held, however, that a venue laid in the body of the complaint is sufficient.⁹ Naming the county in the title of the cause is a sufficient designation of the county in which the plaintiff desires the trial to be had.¹⁰ Where the venue or place of trial is properly laid in the body of the complaint, an improper county laid in the caption or

⁷ See *Garretson v. Hays*, 70 Iowa 19, 29 N. W. 786.

¹ See, ante, §§ 318-388.

² See, ante, §§ 389-436.

³ See 1 *Van Santv. Eq. Pr.* 203; also *Williams v. Wilkinson*, 1 N. Y. Code Rep. (N. S.) 20, 5 How. Pr. 357; *Hall v. Huntley*, 1 N. Y. Code Rep. (N. S.) 21.

⁴ *Merrill v. Grinnell*, 10 How. Pr. (N. Y.) 31, 12 Leg. Obs. 286; *Hotchkiss v. Croker*, 15 How. Pr. (N. Y.) 336; *Davison v. Powell*, 13 How. Pr. (N. Y.) 287.

⁵ *McKenna v. Fisk*, 42 U. S. (1 How.) 241, 11 L. Ed. 117.

⁶ *Hall v. Huntley*, 1 N. Y. Code Rep. (N. S.) 21.

⁷ *Crook v. Pitcher*, 61 Md. 510.

⁸ *Cocke v. Kendall*, Hempst. 236, Fed. Cas. No. 2929b.

⁹ *Dwight v. Wing*, 2 McL. 580, Fed. Cas. No. 4219.

¹⁰ See *Loehr v. Latham*, 15 Cal. 418; *Capp v. Gilman*, 2 Blackf. (Ind.) 45; *Hughes v. Windpfennig*, 10 Ind. App. 122, 37 N. E. 432; *Dollman v. Munson*, 90 Mo. 85, 2 S. W. 134; *Slate v. Post*, 9 Johns. (N. Y.) 81; *Davison v. Powell*, 13 How. Pr. (N. Y.) 287; *Tappan v. Powers*, 2 N. Y. Super. Ct. Rep. (2 Hall) 277, 301; *McKenna v. Fisk*, 42 U. S. (1 How.) 241, 11 L. Ed. 117.

margin may be disregarded as surplusage,¹¹ the caption or title forming no part of the complaint, usually.¹²

§ 808. — NAMES OF PARTIES—IN GENERAL. In addition to what has already been said regarding the necessity of setting out the full names of all the parties, both plaintiffs and defendants,¹ it is to be noted that the law recognizes but one Christian or baptismal name,² and that is the first, all the initials intervening between that and the surname not being regarded as a part of the name.³ The Christian name being required to be given in full in the complaint, a complaint giving the Christian name by initials only has been held to be insufficient, and any judgment rendered thereon void.⁴ The reason given for this

¹¹ 1 Chitty on Pleadings (16th Am. ed.), p. 274.

¹² Supra, § 804.

¹ See, ante, § 803.

Judgment against person not named as a defendant, and not appearing in the action, is void.—Ford v. Doyle, 37 Cal. 346, 348.

—Court can not presume that one who does not appear by the record to have been a party had his day in court.—McCoy v. Allen, 16 W. Va. 731.

“Solecism to speak of his answering or demurring to a complaint in injunction in which he is not named; or moving to dissolve the injunction, in which he does not by any inference appear to have an interest.”—Shinn v. Board of Education, 39 W. Va. 497, 506, 20 S. E. 604.

² Garwood v. Hastings, 38 Cal. 216.

³ People v. Cook, 14 Barb. (N. Y.) 259, 261, affirmed 8 N. Y. 67.

⁴ Weidbold v. Hermann, 2 Mont. 609.

Compare: Curtis v. Vallton, 3 Mont. 154.

Abbreviation of Christian name known and accepted, may be used in a pleading to represent that name.—Kemp v. McCormick, 1 Mont. 420. See McDonald v. State, 55 Fla. 137, 46 So. 177; Mansfield v. Shipp, 128 Ind. 55, 27 N. E. 427.

See, also, 132 Am. St. Rep. 570.

Initial of Christian names, as to sufficiency of designation of parties by. See Kenyon v. Semon, 43 Minn. 180, 45 N. W. 10; State v. Higgins, 60 Minn. 1, 61 N. W. 816; Churchill v. Bielstein, 9 Tex. Civ. App. 445, 29 S. W. 392; Zwickey v. Haney, 63 Wis. 464, 23 N. W. 577; Perkins v. McDowell, 3 Wyo. 328, 23 Pac. 71.

Uncertainty by omission of Christian name waived if objection not taken by demurrer.—Nichols v. Dobbins, 2 Mont. 543.

Pleading to the merits is a waiver of the objection.—Boyd v. Platner, 5 Mont. 232, 2 Pac. 348.

ruling is the fact that men are known by their Christian or baptismal names, and not by the initials thereof;⁵ for while initials may stand for a Christian name, those initials may represent or stand for a great many different Christian names.⁶ The suffixes “Jun.” or “Jr.” and “Sen.” or “Sr.” constitute no part of the name of a party to an action; they are mere unnecessary additions, and should not be inserted in a complaint. Although it is difficult to see why they may not appropriately be used for the purpose of more clearly identifying the party who is a plaintiff or a defendant.

The general rule is that the parties to an action must not only be given by their full names,⁷ but that they must also be designated as plaintiffs and defendants.⁸ However, it seems that if some are named in the title, and all are correctly named in the body of the complaint, it will be sufficient.⁹ But being once stated, it is sufficient afterwards to designate them as “the plaintiff” and “the defendant.”¹⁰ This rule applies when plaintiff sues in an official capacity.¹¹ And if they sue in an official capacity, it is usual and proper that their character should be indicated.¹²

⁵ *Weidbold v. Hermann*, 2 Mont. 609.

⁶ *Id.*; *People ex rel. Yates v. Ferguson*, 8 Cow. (N. Y.) 102; *Haines v. Smith*, 43 N. Y. 775; *Frank v. Levie*, 28 N. Y. Super Ct. Rep. (5 Robt.) 599.

⁷ Names of all the parties thereto, in all actions and proceedings demanding relief, should be properly set forth in the summons and pleadings. A general designation of them as “the heirs of M. C.” is irregular and will not be tolerated. —*Kerlee v. Corpening*, 97 N. C. 330, 2 S. E. 664.

⁸ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 308.

¹ *Code Pl. and Pr.*—72

⁹ *Collins v. Lightle*, 50 Ark. 97, 6 S. W. 596; *Hill v. Thacter*, 2 N. Y. Code Rep. 3, 3 How. Pr. 407.

¹⁰ *Stanley v. Chappell*, 8 Cow. (N. Y.) 235; *Davison v. Savage*, 6 Taunt. 121, 128 Eng. Repr. 979; *Stephenson v. Hunter*, 6 Taunt. 406, 128 Eng. Repr. 1092.

¹¹ *Stanley v. Chappell*, 8 Cow. (N. Y.) 235; *Ketchum v. Morrell*, 2 N. Y. Leg. Obs. 58.

Compare: *Christopher v. Stockholm*, 5 Wend. (N. Y.) 36.

¹² *Morrell v. Morgan*, 65 Cal. 37, 2 Pac. 728; *Sweeny v. Stanford*, 67 Cal. 635, 8 Pac. 444; *More v. Calkins*, 85 Cal. 177, 29 Am. St. Rep. 128, 24 Pac. 729; *Hill v.*

§ 809. ——— MISTAKE IN. We have already seen that the full names of all the parties to the action, both their Christian or baptismal name and their surname, should be given;¹ yet a mere mistake in the name of a party does not affect the merits of the action, where the pleading is otherwise sufficient; because the mistake may be corrected at any time on motion, or by the court of its own motion.² Thus, a mistake in the name even of the plaintiff is not fatal to the action, for it may be corrected at any time on motion, it has been held.³

§ 810. ——— KNOWN AND UNKNOWN PARTIES. We have already treated the question of suing defendant under a fictitious name, when it may be done and the procedure thereon;¹ and it remains but to add that the California procedural code² authorizes the plaintiff, in certain cases, to proceed against parties some of whom are known and others unknown, giving the true names of such as are known, and designating the others by fictitious names, stating in the body of the complaint the reason, that “their true names are unknown.” Thus, if the plaintiff should be ignorant of the name of the adverse party he may designate him by any name, and amend, of course, at any stage of the proceedings, when his true name shall become known.³ But the plaintiff can not thus use a

Thacter, 2 N. Y. Code Rep. 3, 3 How. Pr. 407; Berolzheimer v. Strauss, 51 N. Y. Super. Ct. Rep. (19 Jones & S.) 96, 7 N. Y. Civ. Proc. Rep. 225.

As to titles and the advisability of avoiding them, see, post, § 811.

¹ See, ante, §§ 803, 808.

² Beavers v. Bawcum, 33 Ark. 722.

³ See Bank of Havana v. Magee, 20 N. Y. 356; Trever v. Eighth Ave. R. Co., *42 N. Y. (3 Keyes) 497, 4 Abb. Ct. App. Dec. 422, 6 Abb. Pr. N. S. 46, 6 Transc. App.

208; Barnes v. Perine, 9 Barb. (N. Y.) 202, affirmed 15 Barb. 249, which is affirmed in 12 N. Y. 18; Farnham v. Hildreth, 32 Barb. (N. Y.) 277; Elliott v. Hart, 7 How. Pr. (N. Y.) 25; Dale v. Manley, 11 How. Pr. (N. Y.) 138.

¹ See, ante, § 658.

² Kerr's Cyc. Cal. Code Civ. Proc., § 474.

³ Morgan v. Thrift, 2 Cal. 562; Rosencrantz v. Rogers, 40 Cal. 491; McKinley v. Tuttle, 42 Cal. 577; Campbell v. Adams, 50 Cal. 205; Harris v. Merritt, 63 Cal. 118;

fictitious name at his discretion,⁴ he is restricted to cases where the name of the adverse party is unknown,⁵ and must aver in the pleading that the true name of the party is to the plaintiff unknown.⁶ The record must show the fact that the true names of persons sued under fictitious names are unknown.⁷ Where defendant was sued as John Cox, service of process was upon James Cox, and judgment was entered against J. Cox, this was held to be error, unless there was something in the record to show that the person served and the person against whom the judgment entered, was the person sued.⁸

§ 811. ——— TITLES TO BE AVOIDED. In designating the parties to the action, except where suit is brought in an official or representative capacity, no title or other appellation is necessary. If inserted, it will be treated as mere surplusage.¹ Thus, where the complaint shows a cause of action in favor of the plaintiff, not in his representative but in his individual character, the descriptive words may be rejected, leaving the action to stand as one in the individual capacity of the plaintiff.² And the fact

Jones v. Pearl Min. Co., 20 Colo. 417, 38 Pac. 700.

Petitioning creditors consisting of firms or partnerships, may be described in their firm names, without giving the names of the persons composing the firms or partnerships, in insolvency proceedings.—*Campbell v. Judd*, 2 Cal. Unrep. 522, 7 Pac. 804; *Russell, In Matter of*, 70 Cal. 132, 11 Pac. 622.

⁴ See, ante, § 658.

⁵ *People v. Herman*, 45 Cal. 692; *Crandall v. Beach*, 7 How. Pr. (N. Y.) 271.

⁶ *Waterbury v. Mather*, 16 Wend. (N. Y.) 611; *Gardner v. Craft*, 52 How. Pr. (N. Y.) 499.

⁷ *Ford v. Doyle*, 37 Cal. 346.

⁸ *Sutter v. Cox*, 6 Cal. 415. See *Houghton v. Tibbetts*, 126 Cal. 57, 58 Pac. 318; *Casper v. Klippen*, 61 Minn. 353, 355, 52 Am. St. Rep. 606, 63 N. W. 737.

Sued as "Manuel S. de Brum," a person served whose name is "Manuel S. Brum," can not enjoin a judgment by default.—*Brum v. Ivins*, 154 Cal. 17, 20, 129 Am. St. Rep. 137, 96 Pac. 876.

¹ *Sheldon v. Hoy*, 11 How. Pr. (N. Y.) 11, 15; *Butterfield v. McComber*, 22 How. Pr. (N. Y.) 150; *Root v. Price*, 22 How. Pr. (N. Y.) 372.

² *Thompson v. Whitmarsh*, 100 N. Y. 35, 8 N. Y. Civ. Proc. Rep. 183, 2 N. E. 273; *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58.

that the words “deputy sheriff” follow the defendant’s name in the caption of the complaint, does not make the action one against the defendant as deputy sheriff. The word “as” not preceding such designation, the presumption is that he is sued as an individual, and the words “deputy sheriff” are merely *descriptio personae*;³ and the same is true of the words “administrator,” following the name of a party to an action.⁴

As to real party in interest, see, ante, §§ 583 et seq.

See, also, annotation, 64 L. R. A. 581-624.

³ Greig v. Clement, 20 Colo. 167, 37 Pac. 960.

⁴ Brown v. Quinton, 80 Kan. 48, 18 Ann. Cas. 290, 25 L. R. A. (N. S.)

76, 102 Pac. 242; Rich v. Sowles, 64 Vt. 408, 15 L. R. A. 850, 23 Atl. 723; Sowles v. Sartwell, 76 Vt. 72, 56 Atl. 282; Hanson v. Blake, 63 W. Va. 562, 60 S. E. 589.

See, also, notes 18 Ann. Cas. 290; 15 L. R. A. 850.

CHAPTER V.

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I. FORMAL PARTS AND COMMENCEMENT.

§ 812. **IN GENERAL.** Under the procedural codes in those jurisdictions which have adopted the reformed judicature, the first pleading in an action is known as a complaint, in most of the jurisdictions, and as a petition in others, but denominated a complaint in this treatise.¹ This first pleading or complaint is substituted for the declaration, under the common-law system of judicature, and the nature and character of the action is to be determined from the allegations in the complaint.² The formal parts of pleading, including a complaint, have already been set out,³ and the caption or title,⁴ the subscription to the complaint,⁵ and the verification thereof,⁶ have already been sufficiently treated.

§ 813. **FORMAL PARTS OF BODY OF COMPLAINT.** Under the common law formal and technical system of pleading, the declaration,—which performed the functions of our complaint under the reformed procedure,—consisted of various parts, as follows:

- I. The Commencement;
- II. The Body;
- III. The Conclusion;
- IV. The Profert,—of deeds, probates, letters of administration, etc.;
- V. The Statement of Pledges, to be discounted; and
- VI. Other Miscellaneous Points.¹

¹ In probate proceedings, in California, the initiating pleading is called a "petition." See Kerr's Cyc. Cal. Code Civ. Proc., § 1299, etc.

See Church's Probate Law and Practice, *passim*.

² See, ante, § 527; also Marshall Silver Min. Co. v. Kirtley, 12 Colo. 410, 21 Pac. 492; Hunt v. Eureka Gulch Min. Co., 14 Colo.

451, 24 Pac. 550; Indianapolis, City of, Board School Commrs. v. Center Township, 143 Ind. 391, 42 N. E. 808; Adams v. Ash, 46 Hun (N. Y.) 105.

³ See, ante, § 802.

⁴ See, ante, §§ 803-811.

⁵ See, ante, §§ 777, 778.

⁶ See, ante, §§ 779-801.

¹ 1 Chitty on Pleading (16th Am. Ed.), p. 278.

The body of the declaration was again subdivided into various parts, as follows:

1. Inducement;
2. Consideration;
3. Promise;
4. Averments;
5. Breach; and
6. Consequent damages.²

Each of these parts and sub-parts required certain set and formal, and highly technical (in many instances) allegations in order to insure the sufficiency of the pleading.

Under the codes a certain formality is pursued, but formality is not essential. In fact a certain degree of formality, or rather of methodicalness, is essential to clear and sufficient pleading under the codes, the same as at common law, because it is necessary to clear and distinct statement of the cause of action. Thus, the complaint must have a commencement, which of necessity follows the caption or title of the cause; this must be followed by a narration of, that is an allegation or averment of, the ultimate facts constituting the plaintiff's cause of action; and this, again, must be followed by a prayer, that is, a demand for such relief as the party deems the facts pleaded entitle him to receive. And this is all the formality there is under the code system.³

The allegations or averments of the complaint must be such as to show to the court that a cause of action exists, under the state of facts narrated, in favor of the plaintiff and against the defendant. Thus, in the case of a complaint founded upon a contract the allegations must show, (1) that there was a promise or undertaking on the part of the defendant;⁴ (2) that there was a considera-

² Id.

Pleading and Practice, vol. I, pp.

³ As to formal parts of a complaint under code pleading, see
Jury's Adjudicated Forms of

12, 13.

⁴ Cummings v. Howard, 63 Cal.
503; Hoffman v. Osborn, 15 Cal.

tion moving from the plaintiff, or from another for him;⁵ (3) that the contract was in writing,⁶ in those cases in which a writing is necessary to a valid and enforceable contract under the statute;⁷ (4) that the plaintiff has performed, or offered to perform, his part of the contract;⁸ and (5) that the defendant has breached his contract or undertaking.⁹ There are other instances in which certain formal allegations are essential to a sufficient complaint; but the above illustration of this formal requirement will suffice at this time.

§ 814. **AVERMENT OF CHARACTER AND CAPACITY.** In those cases in which the plaintiff sues in a representative or official character or capacity,¹ the character must be

App. 125, 113 Pac. 705; *Church v. Collins*, 18 Cal. App. 745, 124 Pac. 552.

Agreement to pay contract price need not be specially alleged.—*Whitton v. Sullivan*, 96 Cal. 408, 31 Pac. 1115.

Stipulations necessary to make contract reasonable need not be set out in the complaint, as they will be implied. Thus, in alleging on a contract for excavating and cutting ditches by machine, it is not necessary to incorporate stipulations that the machine should be so employed as not to injure growing or bearing vines.—*Bligerstaff v. Briggs*, 2 Cal. Unrep. 339, 4 Pac. 371.

⁵ *Mann v. Higgins*, 83 Cal. 66, 23 Pac. 206.

"Being indebted" defendant made the contract, need not be alleged, and if alleged may be rejected as surplusage.—*Poirier v. Gravel*, 88 Cal. 82, 25 Pac. 962.

⁶ Execution of contract in writing declared on and set out, need not be specially pleaded, because the execution is presumed unless

denied under oath.—*Berry v. Kowalsky*, 3 Cal. Unrep. 418, 27 Pac. 286.

See, ante, § 780.

Inducements leading up to a written contract need not be set out; but where alleged do not render the complaint ambiguous, uncertain, and unintelligible.—*Hanke v. Eureka Endowment Assn.*, 100 Cal. 429, 34 Pac. 1089.

⁷ Not necessary to allege in writing, as that will be presumed, where the statute requires it to be in writing to be valid; but it is thought better pleading to allege the fact.—See *Emerson v. Bergin*, 76 Cal. 197, 202, 18 Pac. 264; *McCann v. Pennie*, 100 Cal. 547, 35 Pac. 158; *Bradford Invest. Co. v. Joost*, 117 Cal. 204, 207-9, 48 Pac. 1083.

⁸ *Mann v. Higgins*, 83 Cal. 66, 23 Pac. 206; *McPherson v. San Joaquin County*, 6 Cal. Unrep. 257, 56 Pac. 802.

⁹ *Preston v. Central Cal. Water & Irr. Co.*, 11 Cal. App. 190, 104 Pac. 462.

¹ See discussion, ante, § 811.

alleged as well as stated in the caption or title.² It is usual and proper in stating the caption or title to a complaint in such cases to add to the name of the party a designation stating the especial character which he sustains, as "A B, Executor," "C D, Sheriff." This, however, will not dispense with the necessity of the averment of the character in which he sues. Standing alone in the title would be but a mere *descriptio personae*;³ the complaint must contain proper allegations showing that he is entitled to sue in that capacity.⁴ Such an averment, and also an averment that the action is brought by him in such capacity, is sufficient to sustain a recovery in that capacity.⁵ In general a plaintiff can not sue in two capacities, private and representative, in the same action.⁶

Form of allegation in action by a municipal or a state officer, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 14, Form No. 4.

Form of allegation in action by a receiver, see *Jury's Adjudicated Forms of Pleading and Practice*, pp. 17 et seq., Forms Nos. 10-12.

² *Smith v. Levinus*, 8 N. Y. 472, 1 Seld. Notes 103; *Gould v. Geass*, 19 Barb. (N. Y.) 179, 185.

Administrator or executor suing in his official character, must allege that character and capacity in each count in the complaint.—*Hopkins v. Contra Costa County*, 106 Cal. 566, 39 Pac. 933.

Tax-collector sued in his official capacity, the complaint must allege the fact of his being such officer, and where the complaint consists of more than one cause of action, an omission of that allegation in one cause of action is not cured by its allegation in another cause of action in the same complaint.—*Baldwin v. Ellis*, 68 Cal. 495, 9 Pac. 652.

³ *Barfield v. Price*, 40 Cal. 535; *Merritt v. Seaman*, 6 N. Y. 168, reversing 6 Barb. 330; *Murray v. Church*, 58 N. Y. 621, affirming 1 Hun 49, 3 Thomp. & C. 145; *Wetmore v. Porter*, 92 N. Y. 76; *Hallett v. Harrower*, 33 Barb. (N. Y.) 537; *Freeman v. Fulton Fire Ins. Co.*, 38 Barb. (N. Y.) 247, 14 Abb. Pr. 398, 407; *Bonesteel v. Garlinghouse*, 60 Barb. (N. Y.) 338; *Secor v. Pendleton*, 47 Hun (N. Y.) 281; *Buyce v. Buyce*, 48 Hun (N. Y.) 433, 1 N. Y. Supp. 642. See, also, discussion and authorities, ante, § 811.

⁴ *Barfield v. Price*, 40 Cal. 535; *Renton, In Estate of*, 3 Cal. Prob. (Cal.) 533.

⁵ *Fowler v. Westervelt*, 40 Barb. (N. Y.) 374, 17 Abb. Pr. 59; *Agate v. King*, 17 Abb. Pr. (N. Y.) 159, distinguishing *Gould v. Glass*, 19 Barb. (N. Y.) 179, on this point.

⁶ *Yates v. Kimmel*, 5 Mo. 87. See, also, §§ 815, 816 and authorities.

§ 815. — ACTION BY ADMINISTRATOR OR EXECUTOR. The capacity of the plaintiff to sue is independent of the cause of action, and, therefore, in an action by an executor or administrator to enforce a cause of action on which he is authorized to sue as such, the complaint must allege his representative capacity. No formal mode of allegation is essential, provided the plaintiff's right to maintain the action is substantially shown, so that issue may be joined thereon.¹ In conformity with this rule, the complaint should state, in cases of testacy, (1) the death of the decedent, (2) his leaving a last will and testament, (3) the appointment therein of the plaintiff as executor, (4) the probate of the will, (5) the issuance of letters testamentary thereon to the plaintiff, (6) his qualification and entry upon the discharge of his duties as executor, and (7) that he is still acting as such.² In cases of intestacy, the complaint should state, (1) the death of the decedent, (2) without leaving a last will and testament, (3) appropriate allegations of the plaintiff's appointment as administrator, (4) his qualification and entry upon the discharge of his duties as such, and (5) that he is still so acting; and this is the case, although the plaintiff may be the public administrator.³ In the case of either an executor or administrator, the date, place, and court by whom

¹ CAL.—Halleck v. Mixer, 16 Cal. 574; Barfield v. Price, 40 Cal. 535. IND.—English v. Roche, 6 Ind. 62. MO.—Duncan v. Duncan, 19 Mo. 368; State v. Matson, 38 Mo. 489; State v. Patton, 42 Mo. 530; Headlee v. Cloud, 51 Mo. 301; Bird v. Cotton, 57 Mo. 568. MONT.—Knight v. Le Bean, 19 Mont. 223, 225, 47 Pac. 952. N. Y.—Thomas v. Cameron, 16 Wend. 579; Beach v. King, 17 Wend. 197; Willis v. Webster, 9 How. Pr. 251; Johnson v. Kemp, 11 How. Pr. 186; Bank of Lowville v. Edwards, 11 How. Pr. 216; Han-

over Nat. Bank v. Wickham, 16 How. Pr. 97; Kingsland v. Stokes, 25 Hun 107, 61 How. Pr. 494, affirming 58 How. Pr. 1.

Form of allegation in action by an administrator or executor, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, pp. 16, 17, Forms Nos. 7, 9.

² Halleck v. Mixer, 16 Cal. 574; Barfield v. Price, 40 Cal. 535; Kirsch v. Derby, 96 Cal. 602, 604, 31 Pac. 567; Thomas v. Cameron, 16 Wend. (N. Y.) 579.

³ Ketchum v. Morrell, 2 N. Y. Leg. Obs. 58.

letters were granted should be stated;⁴ but it is not necessary that the complaint shall set forth the facts showing that the court had jurisdiction to make the appointment.⁵ If this is not done, the complaint is bad on special demurrer⁶ on that ground.⁷ The complaint must, in addition, set forth facts showing that a duly appointed, qualified and acting administrator or executor is qualified to maintain the action.⁸ Thus, an action can not be maintained by an administrator or executor of a member

⁴ *Barfield v. Price*, 40 Cal. 535; *Emery v. Hildreth*, 68 Mass. (2 Gray) 228; *White v. Joy*, 13 N. Y. 83; *Gillett v. Fairchild*, 4 Den. (N. Y.) 80; *Bloom v. Burdick*, 1 Hill (N. Y.) 130, 134, 37 Am. Dec. 299; *Morrell v. Dickey*, 1 Johns. Ch. (N. Y.) 156; *Williams v. Storrs*, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; *Vroom v. Van Horn*, 10 Pal. Ch. (N. Y.) 550; *Christopher v. Stockholm*, 5 Wend. (N. Y.) 36; *Beach v. King*, 17 Wend. (N. Y.) 197; *Forrest v. New York, City of*, 13 Abb. Pr. (N. Y.) 350; *Vermilya v. Beatty*, 6 Barb. (N. Y.) 429; *Warren v. Eddy*, 32 Barb. (N. Y.) 664, 13 Abb. Pr. 28; *Gulick v. Gulick*, 33 Barb. (N. Y.) 92, 21 How. Pr. 22; *Sheldon v. Hoy*, 11 How. Pr. (N. Y.) 11; *Dayton v. Connah*, 18 How. Pr. (N. Y.) 326; *Tolmie v. Dean*, 1 Wash. Tr. 46.

⁵ *Munro v. Pacific Coast Dredging & Recl. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Cohn v. Husson*, 14 Daly (N. Y.) 200; affirmed, 113 N. Y. 662, 21 N. E. 703.

⁶ Ambiguity and uncertainty in complaint can be raised by special demurrer only.—*Kirsch v. Derby*, 96 Cal. 602, 605, 31 Pac. 567. See *Blanc v. Klumpke*, 29 Cal. 156;

Demartin v. Albert, 68 Cal. 277, 9 Pac. 157; *Blasingame v. Home Ins. Co.*, 75 Cal. 633, 17 Pac. 925; *Heeser v. Miller*, 77 Cal. 192, 19 Pac. 375.

Capacity of administrator or executor to sue may be raised on general demurrer.—*Knight v. Le Bean*, 19 Mont. 223, 229, 47 Pac. 952.

⁷ *Sheldon v. Hoy*, 11 How. Pr. (N. Y.) 11.

In California the appointment of administrators is regulated by the code. See *Kerr's Cyc. Cal. Code Civ. Proc.*, 2d ed., § 1365; *Consolidated Supp. 1906-1913*, p. 1860. See, also, *Church's Probate Law and Practice*, vol. I, p. 348 et seq.

⁸ *Evans v. Supreme Council of Royal Arcanum*, 223 N. Y. 497, 1 A. L. R. 163, 120 N. E. 93.

As to actions by ancillary administrators and executors and when they may be maintained. See *De Paris v. Wilmington Trust Co. (Del.)*, 1 A. L. R. 1352, 104 Atl. 691.

See, also, note 1 A. L. R. 1359.

As to right of personal representative of minor child to maintain action for death caused by negligence of another.—*Legault v. Malacker*, 166 Wis. 58, 1 A. L. R. 1109, 163 N. W. 476.

of a benefit society, to secure restoration of such member, after suspension during his lifetime for non-payment of dues, where the benefit certificate is in favor of the widow.⁹ Likewise, the administrator or executor of a married woman can not maintain an action for damages against her husband, for wrongfully causing her death;¹⁰ the statutes removing the disabilities of married women not giving to the wife a right to maintain an action for damages against her husband for an assault.¹¹

Action by administrator during minority of executor, by parity of reasoning, the complaint must set forth facts showing that the executor has not yet attained his majority, because the administrator's powers are terminated when the executor attains full age.¹² Where the plaintiff's representative capacity is shown, profer of letters testamentary or of administration is no longer necessary.¹³

§ 816. ——— ILLUSTRATIONS OF SUFFICIENT AND INSUFFICIENT ALLEGATIONS. Without attempting to be exhaustive, or even selective, the following illustrations of sufficient and insufficient allegations as to the representative capacity of the plaintiff may be of interest and value. It has been said in New York that the word "as" is essential in the title to the action, nor can it be easily

⁹ *Evans v. Supreme Council of Royal Arcanum*, 223 N. Y. 497, 1 A. L. R. 163, 120 N. E. 93. See *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116; *McClure v. Johnson*, 56 Iowa 620, 10 N. W. 217; *Stephenson v. Stephenson*, 64 Iowa 534, 21 N. W. 19; *Kentucky Masonic Mut. Life Ins. Co. v. Miller*, 76 Ky. (13 Bush) 489; *Maryland Mut. Ben. Soc. v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52; *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166; *Hellenberger v. District No. 1, I. O. B. B.*, 94 N. Y. 580; *Brown v. Supreme*

Council, C. M. B., 33 Hun (N. Y.) 263; *Beeckel v. Imperial Council*, O. U. F., 38 Hun (N. Y.) 7, 11 N. Y. Supp. 321; affirmed, 124 N. Y. 661, 27 N. E. 413.

¹⁰ *Osburn v. Keister* (Va.), 1 A. L. R. 439, 96 S. E. 315.

See, also, note 1 A. L. R. 449.

¹¹ *Id.*

¹² *Yeaton v. Lynn*, 30 U. S. (5 Pet.) 224, 8 L. Ed. 105.

¹³ *Wells v. Webster*, 9 How. Pr. (N. Y.) 251; *Bright v. Currie*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 433, 10 N. Y. Leg. Obs. 104.

replaced by any other word. Thus, a declaration which invariably and more than a dozen times mentioned the plaintiff as "the said Sarah, executrix as aforesaid," closing with profert of letters testamentary, was held to be fatally defective under the old practice.¹ If the plaintiff's character is thus stated in the caption or title, it is not necessary to repeat it, but he may afterwards be called "the plaintiff."² In the same state a complaint averring that the plaintiff has been duly appointed and qualified by the surrogate of New York, to act as the "sole executor of A. B., deceased," was held not sufficient in an action to recover a demand due the estate of the plaintiff's testator;³ and the allegation "duly appointed" was held to be not sufficient, but indefinite.⁴ But it is now held that where the averments in, and the frame of the complaint are such, as to affix to the plaintiff a representative character and standing in the litigation, and to show that the cause of action, if any, devolved upon him solely in that character, the omission in the title to the action of the word "as," between the name of the plaintiff and words descriptive of his representative capacity, does not prevent him from claiming in that capacity.⁵

A complaint commencing "A. B., administrator of the goods, etc., of . . . deceased, plaintiff in this action," and containing no other statement of the fact of the plaintiff's appointment as administrator, does not allege that he is administrator, or show that he prosecutes in that

¹ See *Ogdensburg Bank v. Van Rensselaer*, 6 Hill (N. Y.) 240; *Merritt v. Seaman*, 6 N. Y. 168, reversing 6 Barb. 330; *Smith v. Levinus*, 8 N. Y. 474, 1 Seld. Notes 103; *Gould v. Glass*, 19 Barb. (N. Y.) 179, 185; *Sheldon v. Hoy*, 11 How. Pr. (N. Y.) 11, 14; *Henschall v. Roberts*, 5 East 151, 154, 102 Eng. Repr. 1026.

² *Stanley v. Chappell*, 8 Cow. (N. Y.) 235.

³ *Forrest v. New York, City of*, 13 Abb. Pr. (N. Y.) 350.

⁴ *People ex rel. Crane v. Ryder*, 12 N. Y. 433; *People ex rel. Hawes v. Walker*, 23 Barb. (N. Y.) 304, 305, 2 Abb. Pr. 421; *Cheney v. Flisk*, 22 How. Pr. (N. Y.) 236, 238.

⁵ *Stilwell v. Carpenter*, 62 N. Y. 639, 2 Abb. N. C. 238; *Beers v. Shannon*, 73 N. Y. 292, reversing 12 Hun 161.

capacity.⁶ In an action by an administrator or executor upon a contract entered into with the decedent must allege a promise to pay, but the promise made to the decedent or to the testator should not be stated as made to the plaintiff.⁷

A complaint alleging that there was an instrument purporting to be the last will and testament of A., deceased, duly executed and attested; that it was admitted to probate as such will; that letters testamentary were issued, and that the executors took upon themselves the execution of the instrument, sufficiently shows that the instrument was a will, and that it had been so adjudged by the Probate Court or the Surrogate's Court.⁸ And so, also, a complaint which describes the plaintiff as an executor, and states the cause of action as an indebtedness due to the plaintiff as an executor, and that the money was had and received by the defendant for the use of the plaintiff as such executor, sufficiently shows that the plaintiff sues in his representative capacity.⁹ And an averment that letters testamentary on, etc., and not before, were issued to, etc., is sufficient to import that no other or prior letters had been issued.¹⁰

In California, in an action brought by an administrator who has been appointed after the resignation of a former administrator, the complaint is sufficient if it avers the issue of letters to the former administrator; that he qualified and entered upon the discharge of the trust; that he resigned, and his resignation was accepted by the Probate Court, and that the plaintiff was afterwards appointed

⁶ *Merritt v. Seaman*, 6 N. Y. 168, reversing 6 Barb. 330; *Christopher v. Stockholm*, 5 Wend. (N. Y.) 36; *Worden v. Worthington*, 2 Barb. (N. Y.) 368; *Sheldon v. Hoy*, 11 How. Pr. (N. Y.) 11.

⁷ *Christopher v. Stockholm*, 5 Wend. (N. Y.) 36; *Worden v. Worthington*, 2 Barb. (N. Y.) 370.

⁸ *Mason v. Jones*, 13 Barb. (N. Y.) 461.

⁹ *Scranton v. Farmers & Merchants' Bank*, 33 Barb. (N. Y.) 527; affirmed, 24 N. Y. 424.

¹⁰ *Benjamin v. De Groot*, 1 Den. (N. Y.) 151.

administrator, and qualified, and that letters were issued to him.¹¹ And the same effect, in the absence of a demurrer, was given to an averment that letters of administration were issued on a certain day, by the appropriate court, to the plaintiff, who duly qualified as such administrator, and entered upon the discharge of his duties as such, and now is, and has been, continuously from the date of appointment, such administrator.¹² The allegation of the representative capacity of a substituted executor or administrator may be made by way of amended complaint, and need not be pleaded by supplemental complaint, nor need the allegation be so full as in an original complaint by an executor.¹³ In that state there are only two classes of administrators, special and general; and no such officer as an "administrator de bonis non" is known to our law. When the authority of a general administrator is terminated, and a new one appointed, the latter takes the place of the first, and succeeds to the office, clothed with the same powers, and subject to the

¹¹ Lucas v. Todd, 28 Cal. 182.

All intendments are in favor of the action of a Probate Court, the same as of other courts of record.—Irwin v. Scriber, 18 Cal. 503; Lucas v. Todd, 28 Cal. 182.

Allegations insufficiently made, having been filed by leave of the court, it serves the purpose, when taken in connection with the judgment rendered in the case, of showing that the action was continued in the name of the executor or administrator, which action of the court must be presumed to have been preceded by a proper suggestion of the death of the original party, and satisfactory proof of the appointment and qualification of the legal representative.—Campbell v. West, 93 Cal. 653, 29 Pac. 219.

Conclusiveness of probate is res judicata. See note 21 L. R. A. 681.

¹² McCutcheon v. Weston, 65 Cal. 37, 2 Pac. 727.

¹³ Campbell v. West, 93 Cal. 653, 29 Pac. 219.

Misnomer or misdescription of plaintiff's representative capacity is immaterial, and can not operate to the injury of the defendant.—Campbell v. West, 93 Cal. 653, 29 Pac. 219.

Presumption that duly substituted in court below, on motion, on reversal of a cause not inconsistent with the substitution of the same party as an administrator or executor pending appeal, whether such substitution was or was not a clerical error.—Campbell v. West, 93 Cal. 653, 29 Pac. 219.

same restrictions; and when he invokes the action of the court, he must institute the same proceedings, and, so far as he is able, must make a similar showing.¹⁴ The order for the appointment, the qualification of the appointee, and the issuing of letters to him thereon, are all necessary proceedings to invest such appointee with the office of an administrator. The appointment is in fieri until the appointee has qualified and received his letters;¹⁵ although the soundness of this rule has been questioned in a later case, upholding a sale of land by an administrator acting under unsealed letters of administration, but duly recognized by the court in all proceedings.¹⁶

In Missouri, a complaint stating the character in which the plaintiff sued, the indebtedness to the intestate, and

¹⁴ Haynes v. Meeks, 20 Cal. 288, 316.

"Executor de son tort" not recognized under the California probate practice. — See Valencia v. Bernal, 26 Cal. 335; Hamilton, Estate of, 34 Cal. 464, 468; Pryor v. Downey, 50 Pac. 388, 400, 19 Am. Rep. 656; Bowden v. Pierce, 73 Cal. 459, 463, 14 Pac. 302, 15 Pac. 64.

"Under our system, there is probably no such thing as an executor de son tort; at all events, no man can be executor de son tort in regard to land. And generally, it may be said, an executor de son tort is an executor only for the purpose of being sued, or made liable for the assets with which he has intermeddled." — Pryor v. Downey, 50 Cal. 388, 399, 19 Am. Rep. 656, 659.

In Missouri the same holding has been made as to the local practice.—Rozelli v. Harmon, 29 Mo. App. 583.

¹ Code Pl. and Pr.—73

¹⁵ Hamilton, Estate of, 34 Cal. 464; Pryor v. Downey, 50 Cal. 388, 399, 19 Am. Rep. 656, 659.

¹⁶ Dennis v. Bint, 122 Cal. 39, 43, 47, 68 Am. St. Rep. 17, 31, 54 Pac. 378. See Whyler v. Van Tiger, 2 Cal. Unrep. 800, 14 Pac. 846, upholding, as against a suit by a minor, a lease of lands made by one who had been appointed his guardian and had given bond as such, but had not taken the oath and had not received letters of guardianship. "But this case has not the controlling importance supposed by respondents, because of the difference in the statutes concerning the qualification, etc., of guardians and administrators. See, further, Ganahl v. Soher, 68 Cal. 95, 8 Pac. 650; Baldwin v. Standish, 61 Mass. (7 Cush.) 207; Gallagher v. Holland, 20 Nev. 167, 18 Pac. 834; People v. Dunning, 1 Wend. (N. Y.) 16; Ambler v. Leach, 15 W. Va. 677."

the prayer for judgment as administratrix, was held sufficient as showing her right to sue.¹⁷

§ 817. — ACTION BY AGENT. Where an agent contracts directly as principal, he may maintain a suit in his own name;¹ but he can not maintain a suit in his own name on his principal's contract.² When suing as agent, his character as such agent and his action in such representative capacity must be duly alleged.³ But an agent can not maintain an action as such, unless authorized by statute.

§ 818. — ACTION BY ASSIGNEE. In an action by an assignee the complaint must fully aver that character and the capacity in which the action is brought;¹ although it is held in California that an allegation of appointment and qualification is not necessary when the assignment is duly alleged.² But the form of the assignment, or the consideration thereof, need not be stated.³ And on an assignment by a corporation, the plaintiff need not aver that the directors were authorized to make it.⁴

§ 819. — ACTION BY COMPANY OR PARTNERSHIP. In those cases in which a party plaintiff or defendant is a member of a company the complaint must aver that membership;¹ and the jurisdictional facts and cause of action

¹⁷ *Duncan v. Duncan*, 19 Mo. 368.

¹ *Tustin Fruit Assoc. v. Earl Fruit Co.*, 6 Cal. Unrep. 37, 53 Pac. 693.

² *Chin Kem You v. Ah Joan*, 75 Cal. 124, 128, 16 Pac. 705.

³ *Tolmie v. Dean*, 1 Wash. Tr. 46.

¹ See *Murdock v. Brooks*, 38 Cal. 596; *King v. Felton*, 63 Cal. 66; *Ward v. Healy*, 114 Cal. 191, 195, 45 Pac. 1065; *Wheelock v. Lee*, 15 Abb. Pr. N. S. (N. Y.) 24; reversed on another point, 64 N. Y. 242; *Butterfield v. Macomber*, 22 How. Pr. (N. Y.) 150; *Den-*

ver & R. G. R. Co. v. Wagner, 92 C. C. A. 1527, 167 Fed. 75, 80.

Form of complaint by an assignee, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 15, Form No. 6.

² *Farnsworth v. Sutro*, 136 Cal. 241, 243, 244, 68 Pac. 705.

³ *Morange v. Mudge*, 6 Abb. Pr. (N. Y.) 243; *Fowler v. New Indem. Ins. Co.*, 23 Barb. (N. Y.) 143, 151; reversed on another point, 26 N. Y. 422.

⁴ *Nelson v. Eaton*, 26 N. Y. 410, 16 Abb. Pr. 113.

¹ See *Adams Express Co. v. Harris*, 120 Ind. 73, 16 Am. St.

must be set out.² In case of a partnership suing, it must appear from the complaint that all the plaintiffs were partners at the time the contract sued on was made.³ An action may be brought in the name of a partnership after the partnership has been dissolved, the complaint describing it as a late partnership, and setting forth the names of all the partners.⁴ In the State of New York, where such actions will lie, in actions by or against joint-stock companies, the complaint must allege that the company is a joint-stock company or association, consisting of more than seven shareholders or associates.⁵ But in an action in which the defendants were named Hull & Co., the "& Co." were considered surplusage.⁶ A complaint which contains no other designation of the party plaintiff than the name of a copartnership firm is deemed defective on demurrer.⁷

§ 820. — ACTION BY CORPORATION. In the case of an action or suit by a corporation, the general rule is that the complaint must allege that the plaintiff is a corporation, and show that it is an artificial person capable of suing and being sued;¹ the exception being where the

Rep. 398, 7 L. R. A. 214, 21 N. E. 340; *Firemen's Ins. Co. v. Floss*, 67 Md. 403, 1 Am. St. Rep. 398, 10 Atl. 139; *Tolmie v. Dean*, 1 Wash. Tr. 46.

² *Tolmie v. Dean*, 1 Wash. Tr. 46.

³ *Firemen's Ins. Co. v. Floss*, 67 Md. 403, 1 Am. St. Rep. 398, 10 Atl. 139.

⁴ *Tompkins v. Levy*, 87 Ala. 263, 13 Am. St. Rep. 31, 6 So. 346.

⁵ *Tiffany v. Williams*, 10 Abb. Pr. (N. Y.) 204.

⁶ *Mulliken v. Hull*, 5 Cal. 245.

⁷ *Gilman v. Cosgrove*, 22 Cal. 356; *Boyd v. Platner*, 5 Mont. 226, 232, 2 Pac. 346; *Doll v. Hennessy Mercantile Co.*, 33 Mont. 80, 86,

81 Pac. 626; *Walker v. Parkins*, 1 New. Pr. Cas. 190, 2 D. & L. 982, 9 Jur. 665, 14 Law Jour. Rep. (Q. B.) 214.

¹ CAL.—*Loup v. California So. R. Co.*, 63 Cal. 97, 99; *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303. But, see, *Los Angeles R. Co. v. Davis*, 146 Cal. 179, 182-3, 106 Am. St. Rep. 60, 79 Pac. 865. IDAHO—*Greathouse v. Heed*, 1 Idaho 482; *Miller v. Pine Min. Co.*, 2 Idaho 1206, 35 Am. St. Rep. 289, 31 Pac. 803. N. Y.—*Mechanics' Banking Assoc. v. Spring Valley Shot & Lead Co.*, 13 How. Pr. 227; reversed on another point, 25 Barb. 419. N. C.—*Stanly v. Richmond & D. R. Co.*, 89 N. C. 331.

defendant is estopped from denying the incorporation, as by having contracted with it by its corporate name,² although there are cases to the contrary, as we shall see later in this section. Where incorporation is by statute, the act of incorporation may be pleaded by reciting the title of the act and the date of its passage;³ but it must be set forth with accuracy.⁴ This short mode of pleading permitted by this statute is not intended to relieve corporations from proving their existence.⁵ Where the original act of plaintiff's incorporation is referred to in the complaint, a vague reference to other general statutes

S. D.—*State v. Chicago, M. & St. P. R. Co.*, 4 S. D. 261, 46 Am. St. Rep. 783, 56 N. W. 894. See, also, note 35 Am. St. Rep. 291.

A general allegation of incorporation has been held to be sufficient to meet the requirements.—*Dodge v. Plastic Slate Roofing Co.*, 14 Minn. 49; *Stoddard v. Onondaga Annual Conference of M. P. Church*, 12 Barb. (N. Y.) 573.

At least as against a general demurrer.—*Fegtly v. Village Blacksmith Min. Co.*, 18 Idaho 540, 111 Pac. 130.

Allegation of incorporation essential to enable the court to determine whether jurisdiction of its person lies.—*People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303.

Averment of corporate existence necessary in every count.—See *Loup v. California So. R. Co.*, 63 Cal. 99; *People v. Central Pac. R. Co.*, 83 Cal. 393, 398, 23 Pac. 303.

"No principle of law we are aware of will authorize a court to presume that it was a corporation, any more than it would presume that it was an unincorporated association."—*Corson, J.*, in *State v.*

Chicago, M. & St. P. R. Co., 4 S. D. 261, 46 Am. St. Rep. 783, 56 N. W. 894.

On general demurrer objection may be taken to a failure to state in complaint the fact of incorporation.—*Miller v. Pine Min. Co.*, 2 Idaho 1206, 35 Am. St. Rep. 289, 31 Pac. 803.

Compare: *Los Angeles R. Co. v. Davis*, 146 Cal. 179, 183, 106 Am. St. Rep. 60, 79 Pac. 865 (in action by corporation to quiet title to land, failure to aver in complaint that plaintiff is a corporation, is not available upon general demurrer).

² *Connecticut Bank v. Smith*, 9 Abb. Pr. (N. Y.) 168, 17 How. Pr. 487.

³ See *Kerr's Cyc. Cal. Code Civ. Proc.*, 2d ed., § 459; *Consolidated Supp.* 1906-1913, p. 1468. See, also, *United States Bank v. Haskins*, 1 Johns. Ch. (N. Y.) 132.

⁴ *Union Bank v. Dewey*, 3 N. Y. Super. Ct. Rep. (1 Sandf.) 509.

⁵ *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *Onondaga County Bank v. Carr*, 17 Wend. (N. Y.) 443; *Bank of Waterville v. Belster*, 13 How. Pr. (N. Y.) 270.

affecting the corporation does not render the complaint demurrable.⁶

Municipal corporation suing through plaintiff as supervisor, describing himself in the title of the complaint as supervisor of North Hempstead, and commenced it, "The complaint of the plaintiff above named, as supervisor as aforesaid, shows," etc., it was held on demurrer, a sufficient statement of the capacity in which he sued.⁷

In Indiana, the rule is that where the name of a plaintiff suing imports that the plaintiff is a corporation, the fact of incorporation need not be specifically set out in the complaint.⁸

In New York, where the plaintiff sues by an appropriate corporate name, it is not necessary to aver expressly that the plaintiff is a corporation; in such a case there is an implied averment to that effect.⁹ This holding, however, was upon a demurrer assigning as the grounds thereof: 1. That it appeared from the pleading that the plaintiff had not legal capacity to sue; and, 2. That it did not contain facts constituting a cause of action. But the New York statute now expressly provides that the complaint in an action by or against a corporation must aver that the plaintiff or defendant, as the case may be, is a corporation.¹⁰

⁶ *Sun Mut. Ins. Co. v. Dwight*, 1 Hill. (N. Y.) 50.

⁷ *Smith v. Levinus*, 8 N. Y. 472, 1 Sheld. Notes 103.

⁸ *Adams Express Co. v. Hill*, 43 Ind. 157; *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527; *Sayers v. First Nat. Bank*, 89 Ind. 230; *Adams Express Co. v. Harris*, 120 Ind. 73, 16 Am. St. Rep. 315, 7 L. R. A. 214, 21 N. E. 340; *Ohio Oil Co. v. Detamore*, 165 Ind. 247, 73 N. E. 906; *Ft. Wayne Gas Co. v. Nieman*, 33 Ind. App. 181, 71 N. E. 59.

⁹ *Bank of Genesee v. Patchin Bank*, 13 N. Y. 313; *Phoenix Bank v. Donnell*, 41 Barb. (N. Y.) 571; affirmed, 40 N. Y. 410; *Union Mut. Ins. Co. v. Osgood*, 8 N. Y. Super. Ct. Rep. (1 Duer) 707.

¹⁰ *New York Code Civ. Proc.*, § 1775. See *Fox v. Erie Preserving Co.*, 93 N. Y. 54; *Fraser v. Granite State Provident Assoc.*, 8 Misc. (N. Y.) 7, 23 N. Y. Civ. Proc. Rep. 390, 23 N. Y. Supp. 65; *Noy Mfg. Co. v. Raymond*, 8 Misc. (N. Y.) 352, 28 N. Y. Supp. 693.

§ 821. — ACTION BY GUARDIAN. In New York, where the plaintiff is an infant suing by guardian, the complaint shall contain an allegation of the appointment of the guardian, and it should be stated in a traversable form.¹ Such appointment must be alleged with certainty as to time, place, and power of the appointment.² But an allegation that the appointment was made on the plaintiff's application is implied by the averment that the guardian was "duly appointed."³ When, however, a complaint was entitled, "A B, by C D his Guardian, v. G T," and commenced thus: "The plaintiff, complaining, states," etc., but contained no allegation that the plaintiff was an infant, under the age of twenty-one years, or that the guardian was appointed by any court, it was held bad on demurrer, for the reason that, while it showed that the plaintiff appeared by guardian, it did not show that the guardian was duly appointed, so as to authorize such appearance.⁴ If the allegation be deemed too general, the objection can not be taken by demurrer; the remedy is by motion to make it more definite.⁵

In New Mexico, in those cases in which an action is brought on behalf of infant complainants by their "next friend," it will be presumed that the next friend was duly appointed by the court and leave given to file the complaint.⁶

In California, where an infant sues by a guardian ad litem as provided for in the procedural code,⁷ the com-

¹ Grantman v. Thrall, 44 Barb. (N. Y.) 173; Hulbert v. Young, 13 How. Pr. (N. Y.) 414; Stanley v. Chappell, 8 Cow. (N. Y.) 235.

² Stanley v. Chappell, 8 Cow. (N. Y.) 235; Hulbert v. Young, 13 How. Pr. (N. Y.) 413.

³ People ex rel. Crane v. Ryder, 12 N. Y. 433, affirming 16 Barb. 370; Polly v. Saratoga & W. R. Co., 9 Barb. (N. Y.) 419; People

ex rel. Hawes v. Walker, 23 Barb. (N. Y.) 304, 2 Abb. Pr. 421.

⁴ Stanley v. Chappell, 8 Cow. (N. Y.) 235; Grantman v. Thrall, 44 Barb. (N. Y.) 173; Hulbert v. Young, 13 How. Pr. (N. Y.) 413.

⁵ Sere v. Colt, 5 Abb. Pr. (N. Y.) 481.

⁶ Bent v. Maxwell Land Grant R. Co., 3 N. M. 158, 3 Pac. 721.

⁷ Kerr's Cyc. Cal. Code Civ.

plaint must allege the due appointment of the guardian since the appointment of such guardian is a traversable fact, and must be stated in order that it may be traversed.⁸ But, in an action against infants, neither the petition for the appointment of a guardian ad litem, nor the order making the same, need appear on the judgment-roll. Such appointment may be made on an application ore tenus in open court, as well as in writing, and where the record is silent as to the manner of appointment, the regularity thereof will be presumed.⁹

§ 822. ——— BY GENERAL GUARDIAN. In California a general guardian can not sue in his own name to recover money due the infant. Such actions must be brought in the name of the infant, by his guardian.¹ In an action by an infant, a general guardian, designated in the complaint as a guardian ad litem, is of no importance, if the body of the complaint shows him to be a general guardian.² In Texas, in an action by a guardian, to recover from his ward's estate for services rendered in a suit at law, it must be alleged that the employment of the plaintiff was a reasonable and proper expense incurred by the guardian.³

§ 823. ——— ACTION BY TRUSTEE OF AN EXPRESS TRUST. In an action brought by an express trustee, or by one in whose name a contract is made for the benefit of another,

Proc., 2d ed., § 372; Consolidated Supp. 1906-1913, p. 1409.

⁸ Crawford v. Neal, 56 Cal. 321; Cahill, In re, 74 Cal. 52, 55, 15 Pac. 364; Security Loan & T. Co. v. Kauffman, 108 Cal. 214, 223, 41 Pac. 467; Harris, Estate of, 3 Cal. Prob. (Cal.) 6.

⁹ Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 814; Brady v. Page, 66 Cal. 232, 5 Pac. 103; Batchelder v. Dam, 79 Cal. 266, 267, 21 Pac. 754;

Granger v. Sheriff, 133 Cal. 416, 418, 65 Pac. 873.

¹ Spear v. Ward, 20 Cal. 659, 676; Fox v. Minor, 32 Cal. 119, 91 Am. Dec. 569.

² Spear v. Ward, 20 Cal. 659, 676. See Wise v. Williams, 72 Cal. 544, 547, 14 Pac. 204; Lasar v. Johnson, 125 Cal. 549, 555, 58 Pac. 161; Nisbet v. Cllo Min. Co., 2 Cal. App. 443, 83 Pac. 1080.

³ Caldwell v. Young, 21 Tex. 800.

the general rule of pleading, that the plaintiff must show title in himself in the capacity in which he sues, prevails. Unless, therefore, the description of the obligation, and the breach thereof, disclose such facts, the complaint must make a positive and issuable averment of the trust or agency;¹ that is, must state the facts showing the trust relation.² Thus, one who claims as a substituted trustee under a will, should state all the material facts distinctly in his complaint. If the will provides two modes for the appointment of new trustees, he must state in which mode he was appointed.³

§ 824. — PERMISSION TO SUE. There are cases in which by reason of some special character, a party can not sue or be sued except by permission of the court. In such cases, the obtaining permission to sue should be alleged stating how, when, and from whom obtained, as in case of a receiver;¹ or of a guardian of an habitual drunkard;² or of a lunatic.³

II. STATEMENT OF CAUSE OF ACTION.

§ 825. IN GENERAL. A cause of action being the right a person has to institute and carry through a proceeding,¹ and as the object of the complaint is to present the facts upon which the action is founded in ordinary and concise language,² the manner of the statement of those facts becomes a matter of importance, not only in reference to

¹ *Freeman v. Fulton Fire Ins. Co.*, 13 Abb. Pr. (N. Y.) 124.

² *Mound City Land & Water Assoc. v. Slauson*, 65 Cal. 425, 4 Pac. 396; *Wilson v. Polk County*, 112 Mo. 126, 20 S. W. 469.

³ *Cruger v. Halliday*, 11 Pal. Ch. (N. Y.) 314.

¹ *Chautauqua County Bank v. Risley*, 19 N. Y. 376, 75 Am. Dec. 347; *Merritt v. Lyons*, 16 Wend. (N. Y.) 410; *Angel v. Smith*, 9

Ves. 335, 3 Bro. Chas. 88, 7 Rev. Rep. 214, 32 Eng. Repr. 632.

² *Hall v. Taylor*, 8 How. Pr. (N. Y.) 428.

³ *Williams v. Cameron*, 26 Barb. (N. Y.) 172; *Graham v. Scripture*, 26 How. Pr. (N. Y.) 501.

¹ See, ante, §§ 5 and 6 and authorities cited; also, *Meyer v. Van Collem*, 28 Barb. (N. Y.) 230, 7 Abb. Pr. 222.

² *Kerr's Cyc. Cal. Code Civ. Proc.*, § 426.

the facts which should be alleged, but of such facts as need not be alleged and which ought to be omitted from the complaint.

Statements in complaint should be directly made in positive terms of all the ultimate facts constituting the cause of action, and leave no essential fact in doubt, or to be inferred or deduced by argument from the other facts stated, as inference, argument, or hypothesis can not be tolerated in a pleading.³ The plaintiff is required to state his cause of action with sufficient particularity to inform the defendant of its real character.⁴ The essential facts only are to be stated;⁵ that is, the facts constituting the cause of action as contradistinguished from the law

³ *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492; *Joseph v. Holt*, 37 Cal. 250.

As to facts required to be pleaded, see *Spring Valley Water Works v. San Francisco, City, etc.*, of (dis. op.), 82 Cal. 286, 16 Am. St. Rep. 116, 6 L. R. A. 756, 22 Pac. 1046; *Perkins v. Barnes*, 3 Nev. 557.

⁴ *Puget Sound Iron Co. v. Worthington*, 2 Wash. Tr. 472, 7 Pac. 882, 886.

⁵ *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492; *Bruck v. Tucker*, 42 Cal. 346; *Miles v. Woodward*, 115 Cal. 314, 46 Pac. 1076; *Allen v. Home Ins. Co.*, 133 Cal. 30, 65 Pac. 138; *Winchester v. Howard*, 136 Cal. 452, 89 Am. St. Rep. 153, 64 Pac. 692; *Goodspeed, Ex parte*, 2 Cal. Prob. (Cal.) 149. See *Simons v. Bedell*, 122 Cal. 346, 68 Am. St. Rep. 35, 53 Pac. 3.

As to allegations in pleadings under the reformed judicature, see notes 76 Am. Dec. 498; 82 Am. Dec. 94; 83 Am. Dec. 69; 62 Am. St. Rep. 555.

Cause of action must be stated

as it actually is, and the proofs must establish the cause as stated.

—*Singer v. Salt Lake Copper Mfg. Co.*, 17 Utah 143, 70 Am. St. Rep. 773, 53 Pac. 1024.

Complaint materially defective judgment based thereon is void and not voidable merely.—See *Territory ex rel. Blake v. Virginia Road Co.*, 2 Mont. 96.

—Question of sufficiency of complaint may be raised at any time.

—*Gillette v. Hibbard*, 3 Mont. 419; *Largey v. Sedman*, 3 Mont. 476; *Parker v. Bond*, 5 Mont. 12, 1 Pac. 212; *Quirk v. Clark*, 7 Mont. 233, 14 Pac. 669; *Van Horn v. Holt*, 30 Mont. 71, 75 Pac. 681.

Every fact required to be proved must be alleged in the complaint.

—*O'Connor v. Dingley*, 26 Cal. 11; *Johnson v. Santa Clara County*, 28 Cal. 545; *Nellis v. Pacific Bank*, 127 Cal. 166, 59 Pac. 830; *McNabb v. Wixon*, 7 Nev. 163.

Thus, in an action on a policy of fire insurance upon a building "while occupied as a dwelling house," the complaint must allege that the building was occupied as

in the case, from arguments, from hypothesis⁶ or theory of the case,⁷ and from evidentiary matters or narrative of events.⁸ And the plaintiff must recover, if at all, upon the cause of action as set out in his complaint.⁹ It is not in general necessary to make it appear on the face of a complaint that the court has jurisdiction of the person or of the subject-matter of the action.¹⁰ It is, however, held

a dwelling house at the time of the loss.—*Allen v. Home Ins. Co.*, 133 Cal. 29, 65 Pac. 138.

Fraud alleged, complaint must allege the facts constituting such fraud charged.—*Goodspeed, Ex parte*, 2 Cof. Prob. (Cal.) 149.

Penalty against directors of mining company for failure to post weekly reports of superintendent, sought to be recovered, complaint need not allege that the neglect was wilful and intentional, because the directors are liable *prima facie* for mere neglect.—*Miles v. Woodward*, 115 Cal. 314, 46 Pac. 1076.

Unessential allegation is one which can be stricken out without leaving the complaint insufficient, and where not stricken out need not be proved or disproved.—*Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492.

Unlawful payments and misappropriations charged against the directors of a corporation, complaint must set out the facts showing such unlawful payments and misappropriations.—*Winchester v. Howard*, 136 Cal. 452, 89 Am. St. Rep. 153, 64 Pac. 692.

⁶ Argument, inference and hypothesis can not be tolerated in a pleading.—*Joseph v. Holt*, 37 Cal. 250.

As to argument and inference, see, ante, § 732.

As to necessity that complaint shall state facts and not inferences, see note 79 Am. Dec. 283.

⁷ See, ante, §§ 528-534.

⁸ *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492.

As to pleading matters of evidence, see, ante, § 717.

Narrative of events and evidentiary matter will be struck out on motion.—*Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492.

Matters of evidence and law need not be pleaded.—*Feeney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162, 4 L. R. A. 826, 21 Pac. 984.

Ultimate and not probative facts, only, are to be stated in a complaint.—*Druex v. Domec*, 18 Cal. 83; *Bowen v. Aubery*, 22 Cal. 566; *Wilson v. Cleaveland*, 30 Cal. 192; *Patterson v. Keystone Min. Co.*, 30 Cal. 360; *Camden v. Mullen*, 30 Cal. 564; *De Racouilla v. Rene*, 32 Cal. 450. See *Simons v. Bedell*, 122 Cal. 346, 68 Am. St. Rep. 35, 55 Pac. 3.

⁹ *Burke v. Levy*, 68 Cal. 32; *Gregory v. Cleaveland, C. C. & I. R. Co.*, 112 Ind. 385, 14 N. E. 228; *Easterly v. Barber*, 66 N. Y. 432, 440, reversing 3 Thomp. & C. 421. See, also, post, § 826, footnote 27.

¹⁰ *Koenig v. Nott*, 2 Hilt. (N. Y.) 323, 8 Abb. Pr. 384; *Spencer v. Rogers Locomotive & Mach.*

that in an action against a foreign corporation, the complaint must allege that the plaintiff is a resident, or that the cause of action was, or the subject of it is situated within the state.¹¹

Allegations in a complaint must be consistent with each other, and such as are not consistent, as well as such allegations as are absurd, and the truth of which is impossible, may be regarded as surplusage.¹² An averment at the end of a complaint that the defendant owes the plaintiff is a mere conclusion of law and is not admitted by demurrer.¹³ In California the complaint need not be dated, nor need it state the time when the action was commenced;¹⁴ but the clerk shall indorse on the complaint the day, month, and year the same is filed.¹⁵

§ 826. **FACTS THAT MUST BE STATED.** The formality of statements,¹ and the sufficiency of statements,² in the allegations in pleadings generally have been already sufficiently treated. The complaint in an action at law or a suit in equity should state those ultimate facts, and those only, which constitute the cause of action;³ and the kind of relief the pleader deems the facts pleaded entitle him to should be demanded.⁴ All the material facts out of

Works, 21 N. Y. Super. Ct. Rep. (8 Bosw.) 612, 17 Abb. Pr. 110.

¹¹ House v. Cooper, 30 Barb. (N. Y.) 157, 16 How. Pr. 292.

¹² Sacramento County v. Bird, 31 Cal. 66.

As to surplusage and unnecessary matter in a pleading, see, ante, § 728.

¹³ Millard v. Baldwin, 69 Mass. (3 Gray) 484; Coddington v. Mansfield, 73 Mass. (7 Gray) 272, 79 Mass. (13 Gray) 392.

As to pleading conclusions of law, see, ante, § 715.

¹⁴ Maynard v. Talcott, 11 Barb. (N. Y.) 569.

¹⁵ Kerr's Cyc. Cal. Code Civ. Proc., § 406.

¹ See, ante, § 711.

² See, ante, § 712.

³ See, ante, § 825, footnote 3; also, McDonald v. Bear River & Auburn Water & Min. Co., 15 Cal. 145; Wilson v. Cleaveland, 30 Cal. 192; Rascoullat v. Rene, 32 Cal. 475; Buddington v. Davis, 6 How. Pr. (N. Y.) 402; Holladay v. Elliott, 3 Ore. 340, 346.

Facts and not conclusions of law must be stated in the complaint.— See, ante, § 715; also, Piercy v. Sabin, 10 Cal. 22, 27, 70 Am. Dec. 692; Thomas v. Desmond, 63 Cal. 427; Perkins v. Barnes (dis. op.), 3 Nev. 565.

⁴ Kerr's Cyc. Cal. Code Civ. Proc., § 426; post, §§ 868-871; and,

which the cause of action arose, and also those facts which show that the plaintiff is entitled to maintain the action, in those cases in which such statements are required, should be stated fully but succinctly, and none other;⁵ and the statement thereof should be in an intelligible and issuable form, capable of travers and trial.⁶ Thus, matters of substance, which are necessary to be alleged in a complaint, can not be left out, and the defect supplied by reference to an exhibit attached to the complaint and made part thereof.⁷ And in the case of an

also, *Biddle v. Royce*, 13 Mo. 532; *Bankston v. Farris*, 26 Mo. 175.

⁵ *Hentsch v. Porter*, 10 Cal. 555; *Hicks v. Murray*, 43 Cal. 522; *Elwood v. Gardner*, 45 N. Y. 349, 10 Abb. Pr. N. S. 238, affirming 9 Abb. Pr. N. S. 99; *Van Nest v. Talmage*, 17 Abb. Pr. (N. Y.) 99; *Bracket v. Wilkinson*, 13 How. Pr. (N. Y.) 102; *Wade v. Rusher*, 17 N. Y. Super. Ct. Rep. (4 Bosw.) 537; *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473.

Holladay v. Elliott, 3 Ore. 340; *Smith v. Foster*, 5 Ore. 44.

Evidence from which facts inferred should not be stated, but the ultimate facts themselves.—*Smith v. Foster*, 5 Ore. 44.

Full statement of facts on first pleading is required; and a sufficient showing must be made before an amended complaint setting out facts existing when action commenced will be allowed to be filed.—*Holladay v. Elliott*, 3 Ore. 340.

Objection not stating cause of action may be taken to a complaint for the first time in the appellate court.—*Hentsch v. Porter*, 10 Cal. 555; *Goldberg v. Sisseton Loan & Title Co.*, 24 S. D. 49, 140 Am. St. Rep. 775, 123 N. W. 270.

⁶ *Boyce v. Brown*, 7 Barb. (N. Y.) 80, 81, affirming 3 How. Pr. 391.

⁷ CAL.—*Los Angeles, City of, v. Signoret*, 50 Cal. 298; *Burkett v. Griffith*, 90 Cal. 532, 542, 25 Am. St. Rep. 151, 13 L. R. A. 707, 27 Pac. 527; *McCaughey v. Schuette*, 117 Cal. 223, 225, 59 Am. St. Rep. 176, 46 Pac. 666, 48 Pac. 1088; *Lucas v. Rea*, 7 Cal. Unrep. 363, 101 Pac. 537.

Ahlers v. Smiley, 11 Cal. App. 346, 104 Pac. 998.

But see: CAL.—*Santa Rosa Bank v. Paxton*, 149 Cal. 199, 86 Pac. 194. MONT.—*Quirk v. Clark*, 7 Mont. 31, 33, 14 Pac. 669 (discussing but not deciding point). S. D.—*Aultman & Co. v. Siglinger*, 2 S. D. 442, 446, 50 N. W. 911. UTAH—*Stephens v. American Fire Ins. Co.*, 14 Utah 265, 270, 47 Pac. 83; *Chesney v. Chesney*, 33 Utah 509, 94 Pac. 992. WYO.—*Johnson v. Home Ins. Co.*, 3 Wyo. 140, 143, 6 Pac. 729.

As to adopting and incorporation by reference, see, ante, § 730.

Principal case explained as merely establishing the doctrine that matters of substance which are preliminary or collateral to the instrument which is the foun-

action to recover back money paid under a mistake of fact, it is not sufficient to allege in the complaint merely those ultimate facts which show illegality of the claim and payment thereof under mistake of fact; the complaint must show further, by appropriate allegations, and the proof must establish, not only that the plaintiff has paid the money without receiving an equivalent, but also that it is against good conscience and the principles of natural justice that the money should be retained by the defendant.⁸ Thus, where money is paid in ignorance of the fact that the statute of limitations bars a recovery of the debt, such payment can not be recovered back; for, although the barring of the remedy prevents the creditor from enforcing payment of the claim by an action, yet, since the creditor received from the debtor that only which, in equity and good conscience, was his due, he can not, in equity, be required to return it;⁹ and hence the complaint must set forth facts showing that the plaintiff is entitled, in law or equity, to maintain the action. A statement that the contract sued on was made payable in a specific kind of money, is an allegation of a material fact, under the California statute, making binding a contract to pay in gold coin.¹⁰

Defective allegation of facts,—aliter as to lack of allegation,—may be cured by default or by verdict.¹¹ If

dation of the action can not be supplied by the recitals of the instrument, and as not being in conflict with the rule that it is good pleading to set forth in *hæc verba* an instrument upon which an action is founded.—*Lambert v. Haskell*, 80 Cal. 611, 612, 613, 22 Pac. 327. See, also, *Ward v. Clay*, 82 Cal. 502, 505, 23 Pac. 50, 227; *Whitby v. Rowell*, 82 Cal. 635, 636, 23 Pac. 40, 382; *Cook, Estate of*, 137 Cal. 184, 191, 69 Pac. 968.

⁸ *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473.

⁹ *Id.*; *Moses v. Macfarlan*, 2 Burr. 1005, 97 Eng. Repr. 676.

¹⁰ *Wallace v. Eldredge*, 27 Cal. 498. See note 29 L. R. A. 517.

¹¹ See: *Hentsch v. Porter*, 10 Cal. 555, 559; *People v. Rains*, 23 Cal. 130; *Mercier v. Lewis*, 39 Cal. 535; *Russell v. Mixer*, 42 Cal. 479; *Reynolds v. Hosmer*, 45 Cal. 616; *Alexander v. McDow*, 108 Cal. 25, 29, 41 Pac. 24; *Grosblouis v. Northcut*, 3 Ore. 394, 405.

“Discrimination between insufficient facts and an insufficient statement of facts, is drawn by

a complaint fails to state facts sufficient to constitute a cause of action, advantage may be taken of the defect by demurrer, by motion for judgment on the pleadings, or upon motion for a new trial;¹² but a motion for judgment admits as true the allegations in the complaint.¹³ On a motion for judgment by the defendant because of insufficiency of the complaint, the court can not consider any matter outside of the complaint, or any defense thereto in the answer, or any grounds of a special demurrer to the complaint, because the motion is to be determined upon the same principle as would be a general demurrer to the complaint, and to justify the granting of the motion there must be an entire absence of some fact or facts requisite to constitute a cause of action in favor of the plaintiff and against the defendant.¹⁴

*General rule by which the sufficiency of a complaint is to be tested is that it shall contain all the facts which, upon a general denial, the plaintiff will be bound to prove in the first instance, to protect himself from a nonsuit, and show himself entitled to a judgment.*¹⁵ And this

the courts; and where the necessary facts are shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing by necessary implication, the judgment will be sustained."—Garner v. Marshall, 9 Cal. 268; Hentsch v. Porter, 10 Cal. 555, 559; People v. Rains, 23 Cal. 128; Alexander v. McDow, 108 Cal. 25, 29, 41 Pac. 24.

Divorce proceedings in which the complaint makes no allegations as to property, no intentment will be indulged in favor of a decree transferring from the wife to the children of the parties an estate in fee simple in a particular parcel of land.—Grosblouis v. Northcut, 3 Ore. 394.

¹² Kelley v. Kriess, 68 Cal. 210;

De Toro v. Robinson, 91 Cal. 371, 373, 27 Pac. 671; Hibernia Sav. & L. Assoc. v. Thornton, 117 Cal. 481, 482, 49 Pac. 573; People ex rel. Attorney General v. Brown, 23 Colo. 425, 430, 48 Pac. 661; James River Nat. Bank v. Purchase, 9 N. D. 280, 282, 83 N. W. 7.

¹³ De Toro v. Robinson, 91 Cal. 371, 373, 27 Pac. 671.

¹⁴ Hibernia Sav. & L. Assoc. v. Thornton, 117 Cal. 481, 49 Pac. 573.

¹⁵ Green v. Palmer, 15 Cal. 411, 414, 76 Am. Dec. 492; Northern R. Co. v. Jordan, 87 Cal. 23, 25 Pac. 273; Turner v. Comstock, 1 N. Y. Code Rep. 102, 7 N. Y. Leg. Obs. 23; Tucker v. Rushton, 2 N. Y. Code Rep. 59, 7 N. Y. Leg. Obs. 315; Russell v. Clapp, 7 Barb. (N. Y.)

statement must be made without unnecessary repetition.¹⁶ The statute in this respect is only declaratory of the common law,¹⁷ and is applicable as well to every description of pleading under the procedural codes, whether in law or equity, all distinctions in the form of actions having been abolished.¹⁸ This rule governs all cases of pleading, legal and equitable.¹⁹

Necessity for theory of the case has already been discussed;²⁰ it is sufficient to say here that the general rule is that a complaint in an action must be founded upon a theory under which the plaintiff is entitled to recover, and must state all the facts essential to support such theory, and, failing to do so, it is radically defective, and

482, 4 How. Pr. 347, 3 N. Y. Code Rep. 64; *Bristol v. Rensselaer & S. R. Co.*, 9 Barb. (N. Y.) 158; *Tallman v. Green*, 5 N. Y. Super. Ct. Rep. (3 Sandf.) 437; *Garvey v. Fowler*, 6 N. Y. Super. Ct. Rep. (4 Sandf.) 665, 10 N. Y. Leg. Obs. 16; *Paff v. Kinney*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 380; *Mann v. Morewood*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 557, 564; *Lienan v. Lincoln*, 9 N. Y. Super. Ct. Rep. (2 Duer) 670, 12 N. Y. Leg. Obs. 29.

¹⁶ *Lawrence v. Miller*, 2 N. Y. 253.

¹⁷ *Gladwin v. Stebbins*, 2 Cal. 103.

¹⁸ *Piercy v. Sabin*, 10 Cal. 22, 27, 70 Am. Dec. 692; *Cordier v. Schloss*, 12 Cal. 143, 147.

Payne v. Treadwell, 16 Cal. 220, 243; *McCarthy v. Yale*, 39 Cal. 556; *Cockerell v. Henderson*, 81 Kan. 335, 50 L. R. A. (N. S.) 1, 105 Pac. 443.

¹⁹ *Goodwin v. Hammond*, 13 Cal. 169, 73 Am. Dec. 574; *Riddle v. Baker*, 13 Cal. 295, 302; *Payne v. Treadwell*, 16 Cal. 220, 243;

Haight v. Green, 19 Cal. 117; *Haggin v. Kelly*, 136 Cal. 481, 483, 69 Pac. 140; *McCauley v. Gilmer*, 2 Mont. 205; *Billings v. Sander-son*, 8 Mont. 201, 204, 19 Pac. 307; *McKay v. McDougal*, 19 Mont. 488, 493, 48 Pac. 988; *Lewis v. St. Paul, M. & M. R. Co.*, 5 S. D. 148, 154, 58 N. W. 580; *Brady v. Kreuger*, 8 S. D. 464, 467, 59 Am. St. Rep. 773, 66 N. W. 1083; *Jones v. Memmott*, 7 Utah 340, 343, 26 Pac. 925.

Equity rules of pleading are suspended by the procedural codes, although code pleading follows equity pleading under the common-law system.—See: *Cordier v. Schloss*, 12 Cal. 143, 147; *Bostic v. Love*, 16 Cal. 73; *Wa Ching v. Constantine*, 1 Idaho 266.

Equitable defense allowed to an action at law.—*Houghtaling v. Ellis*, 1 Ariz. 383, 387, 25 Pac. 534; *Wa Ching v. Constantine*, 1 Idaho 266, 267; *First Nat. Bank v. Bews*, 3 Idaho 492, 31 Pac. 818.

²⁰ See, ante, §§ 528-534. See, also, note 50 L. R. A. (N. S.) 3.

does not state facts sufficient to constitute a cause of action;²¹ although, under the provisions of some of the procedural codes it is held that where an action on contract or in tort might be maintained on the same state of facts, plaintiff is not required to have a "theory of the case" on which he prosecutes, and can not be required to elect whether he will proceed on contract or in tort.²²

A complaint materially defective if, to lay the foundation of a recovery, the proof must go further than the allegations it contains.²³ It must be so framed "as to raise upon its face the question, whether, admitting the facts stated to be true, the plaintiff is entitled to judgment, instead of leaving that question to be raised or determined upon the trial;²⁴ for where a complaint shows no legal cause of action on its face, a judgment by default can no more be taken than it can be over a general demurrer.²⁵ If the complaint contains one good count, though the findings of fact are defective, it will be sufficient;²⁶ since a plaintiff can recover only for such causes of action as are stated in his complaint,²⁷ he must show

²¹ Buena Vista Fruit & Vineyard Co. v. Tuohy, 107 Cal. 243, 40 Pac. 386; Ætna Powder Co. v. Hildebrand, 137 Ind. 462, 45 Am. St. Rep. 194, 37 N. E. 136.

²² See Cockerell v. Henderson, 81 Kan. 335, 50 L. R. A. (N. S.) 1, 105 Pac. 443.

²³ Stanley v. Whipple, 2 McL. 35, Fed. Cas. No. 13286.

²⁴ 1 Van Santv. Eq. Pl. 216.

²⁵ CAL.—Abbe v. Abarr, 14 Cal. 210, 211-2; Choyinski v. Cohen, 39 Cal. 502, 2 Am. Rep. 476; Harmon v. Ashmead, 60 Cal. 441, 442. COLO.—Arkansas River Land & Reservoir Co. v. Nelson, 4 Colo. App. 438, 440, 36 Pac. 307. IND.—Old v. Mohler, 122 Ind. 594, 598, 23 N. E. 967. MONT.—Territory ex rel. Blake v. Virginia Road Co.,

2 Mont. 96, 101. N. M.—Dame v. Cochiti Reduction & Imp. Co., 13 N. M. 15, 79 Pac. 298. N. D.—Scottish-American Mortgage Co. v. Reeve, 7 N. D. 99, 100, 72 N. W. 1088. UTAH—Selz, Schwab & Co. v. Tucker, 14 Utah 132, 135, 37 Pac. 249.

²⁶ Lucas v. San Francisco, City of, 28 Cal. 591; Nevada County & Sacramento Canal Co. v. Kidd, 37 Cal. 282, 308; Terrill v. Terrill, 109 Cal. 413, 42 Pac. 137; De Tolna v. De Tolna, 135 Cal. 575, 578, 67 Pac. 1045; Marshall v. Bouldin, 8 Mo. 244; State v. Campbell, 10 Mo. 724; Hayden v. Sample, 10 Mo. 215.

²⁷ Benedict v. Bray, 2 Cal. 250, 256, 56 Am. Dec. 332; Mayer v. Ver Bryck, 46 Neb. 221, 64 N. W.

a good cause of action,²⁸ and facts sufficient to constitute it.²⁹

§ 827. ALLEGING FACTS UPON INFORMATION AND BELIEF. We have already discussed at some length the method of setting out matters pleaded which are not within the knowledge of the pleader;¹ and it remains here to add that the decisions are numerous and irreconcilable on the question whether allegations made upon information and belief should be distinguished by the phrase, "alleges upon information and belief,"² and the practitioner must follow the rule and the decisions in his particular jurisdiction. In New York the procedural code settles the question by providing that "the allegations or denials in a verified pleading must, in form, be stated to be made by the party pleading. Unless they are therein stated to be made upon the information and belief of the party, they must be regarded, for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the pleading. An allegation that the party has not sufficient knowledge or information to form a belief with respect to a matter, must, for the same purposes, be regarded as an allegation that the person verifying the pleading has not such knowledge or information."³ The difference in the authorities upon this question has grown out of a very literal application of the rule that all facts must be positively alleged. When pleadings were not required to be verified, the rule was of easy application. But this rule

691; *Bowen v. Webster*, 3 App. Div. (N. Y.) 86, 38 N. Y. Supp. 917; *Smith v. Smith*, 4 App. Div. (N. Y.) 227, 38 N. Y. Supp. 551; *Bender v. Bender*, 14 Ore. 353, 356, 12 Pac. 713; *Shaw v. Fleming*, 174 Pa. St. 52, 34 Atl. 555.

See, also, ante, § 825, footnote 9.

²⁸ *Russell v. Ford*, 2 Cal. 86; *Little v. Mercer*, 9 Mo. 216; *Harris*

v. Harris, 39 N. H. 53, 75 Am. Dec. 207; *Stevens v. Baker*, 1 Wash. Tr. 317.

²⁹ *Summers v. Farish*, 10 Cal. 347; *Maguire v. Vice*, 20 Mo. 429.

¹ See, ante, § 719.

² Information "or" belief, in California.—See, ante, § 796.

³ New York Code Civ. Proc. § 524.

related to the form of the allegation and not to the knowledge of the party. It is evident that a fact may be averred positively, so far as the form of the allegation is concerned, and yet the truth of the allegation rests upon information and belief. A failure to distinguish in the pleading between facts stated on personal knowledge and those stated on information and belief must of necessity defeat, to a great extent, the object to be attained by verification, unless the person verifying shall be held to have made every allegation upon personal knowledge.

§ 828. — PROPRIETY AND SUFFICIENCY OF. In California, the propriety and sufficiency of allegations upon information and belief, otherwise unobjectionable, have not been questioned, unless in injunction cases;¹ and the same rule prevails elsewhere.² Facts not presumptively within the knowledge of the pleader may be alleged upon information and belief.³ And the objection that the averments of a complaint are made on information and belief is not a ground of demurrer either general or special. The objection can be raised by motion only.⁴ A direct allegation of a fact may be expressed to be made “upon information and belief,” and is not on that account bad on demurrer. But, sufficient facts having been stated as existing, the allegation of the pleader that he states them “upon information and belief,” will be regarded as surplusage.⁵

¹ See *Patterson v. Ely*, 19 Cal. 28, 30, 35, 40; *Kirk v. Rhoads*, 46 Cal. 398, 403; *McCardle v. Barstow*, 145 Cal. 135, 136, 78 Pac. 371.

² *Bennett v. Leeds Mfg. Co.*, 110 N. Y. 150, 17 N. E. 669; *Roby v. Hallock*, 5 Abb. N. C. (N. Y.) 86, 55 How. Pr. 412; *Sheldon v. Sabin*, 12 Daly (N. Y.) 84, 4 N. Y. Civ. Proc. Rep. 4; *New York Marbled Iron Works v. Smith*, 11

N. Y. Super. Ct. Rep. (4 Duer) 362.

³ *Jones v. Pearl Min. Co.*, 20 Colo. 417, 38 Pac. 700; *Robinson v. Ferguson*, 119 Iowa 325, 93 N. W. 350; *Thackara v. Reid*, 1 Utah 238; *Crane Bros. Mfg. Co. v. Reed*, 3 Utah 506, 24 Pac. 1056.

⁴ *Id.*; *Carpenter v. Smith*, 20 Colo. 39, 36 Pac. 789.

⁵ *Warburton v. Ralph*, 9 Wash. 537, 38 Pac. 140.

In Indiana, an affidavit sworn to upon the belief of a party is held equivalent to swearing that it is true.⁶

In North Dakota, a denial upon information and belief is authorized by the procedural code in a case where the party making the denial has information inducing a belief that the facts sought to be denied are untrue, but has not absolute knowledge that they are untrue. In such case a general denial, or a denial of knowledge or information sufficient to form a belief, would be improper.⁷

In Washington, under the procedural code section governing and covering the verification of pleadings,⁸ a complaint asking for a temporary injunction verified upon the belief of the applicant is sufficient.⁹

§ 829. SEPARATE STATEMENTS OF CAUSES OF ACTION. In those cases in which there is more than one cause of action set forth, each cause of action should be separately and distinctly stated.¹ A complaint which fails to keep

⁶ *Thayer v. Burger*, 100 Ind. 262; *Champ v. Kendrick*, 130 Ind. 549, 30 N. E. 787.

⁷ *Russell v. Amundson*, 4 N. D. 112, 59 N. W. 477.

⁸ Wash. Code, § 203.

⁹ *Cady v. Case*, 11 Wash. 124, 39 Pac. 375.

¹ CAL.—*Buckingham v. Waters*, 14 Cal. 147; *Boles v. Cohen*, 15 Cal. 150, 152; *Watson v. San Francisco & H. B. R. Co.*, 41 Cal. 17; *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303. COLO.—*National Fuel Co. v. Green*, 50 Colo. 307, 115 Pac. 709. IDAHO—*Kruger v. St. Joe Lumber Co.*, 11 Idaho 504, 83 Pac. 695. MO.—*Henderson v. Dickey*, 50 Mo. 161. OHIO—*Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582. ORE.—*Eaton v. Oregon R. & Nav. Co.*, 19 Ore. 391, 24 Pac. 415; *Moore v. Halliday*, 43 Ore. 243, 99 Am. St.

Rep. 724, 72 Pac. 801; *Harvey v. Southern Pac. Co.*, 46 Ore. 505, 80 Pac. 1061; *Dornsife v. Ralston*, 55 Ore. 254, 106 Pac. 13. UTAH—*Claffin Co., H. B., v. Simon*, 18 Utah 153, 55 Pac. 376. WASH.—*Hockersmith v. Ferguson*, 51 Wash. 256, 98 Pac. 670.

Assault and battery by agent is a separate cause of action from a like tort by the principal at another time, and must be set forth in the complaint as a separate cause of action, or may be prosecuted in a separate action.—*Dornsife v. Ralston*, 55 Ore. 254, 106 Pac. 13.

Different forms of relief sought against different defendants, the cause of action against each must be separately stated in a distinct cause of action.—*Hockersmith v. Ferguson*, 51 Wash. 256, 98 Pac. 670.

separate the different grounds of action, but confuses and blends them in one statement, is open to the objection of duplicity. But duplicity does not consist in the union of several facts, constituting together but a single cause of action.² Not only should each cause of action be

Interest on purchase price of goods sold and delivered does not constitute a separate cause of action; and an allegation that a stated sum is due for or as interest, does not affect the sufficiency of the complaint.—*Friend & Terry Lumber Co. v. Miller*, 67 Cal. 464, 8 Pac. 40.

Material matter of separate causes of action stated in a complaint, must be complete for each cause within itself.—*Moore v. Halliday*, 43 Ore. 243, 99 Am. St. Rep. 724, 72 Pac. 801.

Separate prayer required by some of the cases for each cause of action stated.—*Clafin Co., H. B., v. Simon*, 18 Utah 153, 55 Pac. 376.

Separately numbering paragraphs in a complaint, does not vitiate the pleading setting up but a single cause of action.—*Minter v. Gose*, 13 Wyo. 178, 78 Pac. 948.

Three causes of action set out in distinct form, each cause of action referring to an attached statement, in which statement the items are arranged in chronological order, instead of being grouped under the appropriate causes of action, but a reference to the account showing which items belong under the respective causes of action, the separate causes of action are sufficiently pleaded.—*Peterson v. Pantheon Lumber Co.*, 62 Wash. 189, 113 Pac. 562.

² *Murray v. Murray*, 115 Cal.

266, 56 Am. St. Rep. 97, 37 L. R. A. 626, 47 Pac. 37; *Harker v. Brink*, 24 N. J. L. (4 Zab.) 333; *Hough v. Hough*, 25 Ore. 218, 35 Pac. 249.

Damages for injury to dwelling resulting from the operation of a stone-quarry in proximity thereto sought, and also injunction asked restraining the further maintenance thereof, allegations of the complaint that large rocks were thrown on plaintiff's premises during the blasting and that the houses were injured and life endangered by the flying rock; that large amount of screenings and dirt filled up the sewers, causing great volumes of sewer-gas to arise therefrom, endangering the health and lives of the plaintiff, his family, and his tenants; that clouds of dust arose and filled the air, to the injury of the health of the plaintiff, his family, and his tenants,—going to the propriety of the injunction prayed, and not constituting the basis for the damages asked, constitute but one cause of action, and are not open to the objection that there are two causes of action stated, one for injury to the property, and another for injury to the person, which should be separately stated and numbered.—*Rooney v. Gray*, 145 Cal. 753, 79 Pac. 523.

Defects or omissions in subsequent causes of action are not cured or supplied by the allegations in the first cause of action,

separately and distinctly pleaded, but each separate and distinct proposition of each cause of action should be separately set forth, and logical order should be observed in the statement of the premises, leaving the conclusions of law deducible therefrom to be drawn by the court. The better practice is to number each cause of action, and each proposition of each cause of action.³

Causes of action required to be separately stated are such as by law entitle the plaintiff to separate actions, and each of which would be a perfect cause of action in itself,⁴ and such statement should begin with appropriate words to designate it as such.⁵ Each statement must be complete in itself, or must be made so by express reference to other parts of the pleadings.⁶ That reference may be made to other allegations was the rule at common law,⁷ has become quite prevalent in California, and

in the absence of reference there-
to.—*Bedwell v. Babcock*, 87 Cal.
29, 25 Pac. 752.

Defendants jointly liable for
separate tortious acts, plaintiff is
not required to separately state
and number his causes of action
against each.—*Arnold v. Chicago*,
R. I. & P. R. Co., 86 Kan. 12, 119
Pac. 373.

Erroneously labeling as "a sep-
arate cause of action" a detail of
matters tending to show the ex-
tent, form and nature of the relief
to which the plaintiff is entitled,
does not affect the substantial in-
terests of the parties.—*Murray v.*
Murray, 115 Cal. 266, 56 Am. St.
Rep. 97, 37 L. R. A. 626, 47 Pac.
37. See *Paterson v. Watson*, 35
Colo. 502, 83 Pac. 958.

³ *Benedict v. Seymour*, 6 How.
Pr. (N. Y.) 298; *Blanchard v.*
Strait, 8 How. Pr. (N. Y.) 83.

⁴ *Sturges v. Burton*, 8 Ohio St.
215, 72 Am. Dec. 582.

⁵ *Lippincott v. Goodwin*, 6 How.
Pr. (N. Y.) 242; *Benedict v. Sey-*
mour, 6 How. Pr. (N. Y.) 242.

⁶ *Watson v. San Francisco & H.*
B. R. Co., 41 Cal. 17; *Ritchie v.*
Garrison, 10 Abb. Pr. (N. Y.) 246;
Victory Webb, etc., Mfg. Co. v.
Beecher, 55 How. Pr. (N. Y.) 193;
First Nat. Bank v. Laughlin, 4
N. D. 391, 406, 61 N. W. 473.

As to pleading by reference, or
by reference and adoption, see,
ante, § 730.

In Indiana practice a defective
or an omitted allegation of fact in
one paragraph of a complaint can
not be cured or supplied by refer-
ence to allegations in another
paragraph.—*Farris v. Jones*, 112
Ind. 498, 14 N. E. 484.

⁷ *Griswold v. National Ins. Co.*,
3 Cow. (N. Y.) 96; *Freeland v.*
McCullough, 1 Den. (N. Y.) 414,
43 Am. Dec. 685; *Crookshank v.*
Gray, 20 Johns. (N. Y.) 344;
Loomis v. Swick, 3 Wend. (N. Y.)

where the reference to a preceding count is definite and certain, there seems no serious objection to it,⁸ other than the hazard of such a method of pleading, heretofore pointed out.⁹ A complaint seeking to recover on two causes of action must show how much is due on each. In a word, each cause of action must be clearly and explicitly stated, and must be perfect in itself.¹⁰ Where two causes of action are not separately stated, the objection can not be raised by a demurrer upon the ground that several causes of action are improperly united, but the remedy is by a motion to make the pleading more definite and certain by separating and distinctly stating the different causes of action.¹¹ Different causes of action are not stated where both legal and equitable relief are sought in the same pleading, but the right to such relief is based upon the same facts.¹²

§ 830. SINGLE CAUSE OF ACTION STATED IN TWO COUNTS. The question whether, under the procedural codes, where there is but a single cause of action, the plaintiff may be

205; *Porter v. Cummings*, 7 Wend. (N. Y.) 172.

⁸ *Barlow v. Burns*, 40 Cal. 350; *Haskell v. Haskell*, 54 Cal. 265; *Bidwell v. Babcock*, 87 Cal. 29, 25 Pac. 752; *Treweek v. Howard*, 105 Cal. 434, 442, 39 Pac. 20; *Jasper v. Hazen*, 2 N. D. 401, 406, 51 N. W. 583.

"It never has been the settled law here that the preliminary averments of a complaint can never be made part of the subsequent counts by apt and express reference, and without being rewritten. In the opinion of the court in *Pennie v. Hildreth*, 81 Cal. 127 (at page 131), 22 Pac. 398, where, in a second count, it was averred 'that certain paragraphs of the first count are true,' the pleading was honestly criticised,

and certain remarks were made which were obiter dicta; but nothing upon the subject was decided." —*McFarland, J.*, in *Green v. Clifford*, 94 Cal. 49, 51-2, 29 Pac. 331. See *Treweek v. Howard*, 105 Cal. 434, 442, 39 Pac. 20.

⁹ See, ante, § 730.

¹⁰ *Buckingham v. Waters*, 14 Cal. 146; *Watson v. San Francisco & H. B. R. Co.*, 41 Cal. 17. *Clark v. Farley*, 10 N. Y. Super. Ct. Rep. (3 Duer) 645.

¹¹ *Fraser v. Oakdale Lumber & Water Co.*, 73 Cal. 187, 190; *City Carpet Beating, etc., Works v. Jones*, 102 Cal. 506, 36 Pac. 841.

See, also, *Pomeroy's Code Remedies*, §§ 446, 447.

¹² *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549, 29 Am. St. Rep. 839, 41 Pac. 495.

permitted to state that cause of action in two or more varying counts, to meet the exigencies of the proof on the trial, as he could under the common-law system of pleading and procedure, is one upon which the courts are divided and the decisions are not harmonious. Such a method of pleading is held to be intolerable in Kentucky,¹ Missouri,² New York,³ Ohio,⁴ Washington,⁵ Wisconsin,⁶ and perhaps elsewhere, and this rule is upheld by the leading law writers;⁷ while, on the other hand, in Indiana,⁸ Iowa,⁹ Kansas,¹⁰ Montana,¹¹ New Mexico,¹² and

¹ *Murphy v. Estes*, 69 Ky. (6 Bush) 532.

² *Druiding v. Lyon*, 7 Mo. App. 199.

³ *Whittier v. Bates*, 2 Abb. Pr. (N. Y.) 477; *Nash v. McCauley*, 9 Abb. Pr. (N. Y.) 159; *Hepburn v. Babcock*, 9 Abb. Pr. (N. Y.) 159, note; *Fern v. Vanderbilt*, 13 Abb. Pr. (N. Y.) 72; *Higgins v. Thomas*, 13 Abb. Pr. (N. Y.) 72, note; *Stockbridge Iron Co. v. Mellen*, 5 How. Pr. (N. Y.) 439; *Sipperly v. Troy & B. R. Co.*, 9 How. Pr. (N. Y.) 93; *Churchill v. Churchill*, 9 How. Pr. (N. Y.) 552; *Lackey v. Vanderbilt*, 10 How. Pr. (N. Y.) 155; *Dunning v. Thomas*, 11 How. Pr. (N. Y.) 281; *Fern v. Vanderbilt*, 13 How. Pr. (N. Y.) 72; *Dickens v. New York Cent. R. Co.*, 13 How. Pr. (N. Y.) 228; *Ford v. Mattice*, 14 How. Pr. (N. Y.) 91; *Mead v. Mall*, 15 How. Pr. (N. Y.) 347; affirmed in *Cazeaux v. Mall*, 25 Barb. (N. Y.) 578; *Gardner v. Locke*, 2 N. Y. Civ. Proc. Rep. (Browne) 252; *Comstock v. Hoeft*, 1 N. Y. Monthly L. Bull. 43.

⁴ *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582; *Ferguson v. Gilbert*, 16 Ohio St. 88, 91; *Draper v. Moore*, 2 Cin. Super. Ct. Rep. (Chic) 167.

⁵ *Gabrielson v. Hague Box & Lumber Co.*, 55 Wash. 342, 133 Am. St. Rep. 1032, 104 Pac. 635.

Action for work and labor done cause may be presented in the alternative, upon the express contract and upon quantum meruit.—*Holmes v. Chicago, M. & S. P. R. Co.*, 59 Wash. 293, 109 Pac. 799.

⁶ *Muzzy v. Ledlie*, 23 Wis. 445.

⁷ *Bliss on Code Pleading*, § 119; *Boone on Code Pleading*, § 36; *Pomeroy on Code Remedies and Remedial Rights*, § 576.

⁸ *Snyder v. Snyder*, 25 Ind. 399; *Stearns v. Dubois*, 55 Ind. 257.

⁹ *Parsons v. Milwaukee & St. P. R. Co.* 45 Iowa 497; *Van Brunt v. Mather*, 48 Iowa 503.

¹⁰ *Curtis v. Buckley*, 14 Kan. 449; *Hentig v. Kansas Loan & Trust Co.*, 28 Kan. 617, 620; *Edwards v. Hartshorn*, 72 Kan. 19, 1 L. R. A. (N. S.) 1050, 82 Pac. 520; *Van Arnsdale-Osborne Brokerage Co. v. Foster*, 79 Kan. 669, 100 Pac. 480.

¹¹ *Blankenship v. Decker*, 34 Mont. 292, 85 Pac. 1035; *Neuman v. Grant*, 36 Mont. 77, 92 Pac. 43.

¹² *Ross v. Car*, 15 N. M. 17, 103 Pac. 307.

perhaps elsewhere, it is held that the common-law doctrine permitting a single cause of action to be so pleaded still prevails in full force.

In California, the statement of a cause of action in several counts, instead of in a single count,—there being no provision in the procedural code¹³ to the effect that there shall be no unnecessary repetition of the facts constituting the cause of action,—does not, of itself, render the complaint ambiguous and uncertain, or open to a general demurrer on that account,¹⁴ and the plaintiff will not be required to elect on which count he will proceed to trial.¹⁵ Thus, it has been said in that state that a complaint in an action in forcible entry and detainer, which sets out the cause of action in two or more counts, is not defective because the property is not described in but one count.¹⁶

In Colorado, the same doctrine as that in California prevails,¹⁷ although the procedural code of that state provides that there shall be no unnecessary repetition of the facts constituting the cause of action,¹⁸ and a plaintiff is permitted to state a cause of action arising out of the same transaction in more than one count, where it appears that such pleading may be necessary to meet the possible proofs, which will for the first time fully appear on the trial;¹⁹ although, as a general rule, such double pleading

¹³ Kerr's Cyc. Cal. Code Civ. Proc., § 426.

¹⁴ Demartin v. Albert, 68 Cal. 277, 9 Pac. 157. See Bernero v. South British & National Ins. Co., 65 Cal. 386, 4 Pac. 382.

General demurrer never reaches such objections; the particular matter constituting the ambiguity or uncertainty must be pointed out by a special demurrer.—Blanc v. Klumpke, 29 Cal. 157; Demartin

v. Albert, 68 Cal. 277, 279, 9 Pac. 157.

¹⁵ Remy v. Olds, 4 Cal. Unrep. 240, 21 L. R. A. 645, 34 Pac. 216.

¹⁶ Porter v. Murray, 2 Cal. Unrep. 687, 12 Pac. 425.

¹⁷ Cramer v. Oppenstein, 16 Colo. 504, 27 Pac. 716.

¹⁸ Colo. Code, § 49.

¹⁹ Vindicator Consol. Gold Min. Co. v. Firstbrook, 30 Colo. 498, 10 Ann. Cas. 1108, 86 Pac. 313.

is not permitted,²⁰ the trial judge being invested with the discretion to determine whether it is unnecessary repetition to state the same cause of action in two or more different counts.²¹

The better doctrine, sounder in principle and more in conformity with the principles and purposes of the procedural codes, is unquestionably the one announced in the first line of cases, prohibiting a dual pleading of a single cause of action, on the ground of three or more separate reasons which have been given, as follows: (1) Pleadings under the code must be as liberally construed as the stating part of a bill in chancery by courts of equity; and hence there is no more necessity for stating the facts constituting a single cause of action separately and in different forms under the code than there is for courts of equity and of admiralty to have adopted such a practice.²² (2) The theory of the code is that the party pleading knows, or should know, beforehand what is the truth of his case, and that he should state the truth, and nothing but the truth, in his pleading. The statement of the case in different forms, for the purpose of guarding against a variance between the allegations and the proof, is no longer necessary; the court that tries the issues being now vested with power to allow an amendment of the pleadings whenever the ends of justice require it.²³ And (3) the principal, and I am constrained to say almost if not the only beneficial, object of the legislature in adopting a procedural code was to abolish the use of fictitious allegations in pleadings, which had a tendency to mislead the parties, and embarrass those to whom the administration of the law is confided; and as there can be

²⁰ Cripple Creek Min. Co. v. Brabant, 37 Colo. 423, 87 Pac. 794;
Cripple Creek Min. Co. v. Esteb, 27 Colo. 431, 87 Pac. 796.

²¹ Manders v. Craft, 3 Colo. App. 236, 32 Pac. 836.

²² Judge Swan in Sturges v. Burton, 8 Ohio St. 215, 72 Am. Dec. 582.

²³ Harris, J., in Dunning v. Thomas, 11 How. Pr. (N. Y.) 281.

but one substantially true statement of a single cause of action, the practice of setting it forth in different counts is necessarily abolished.²⁴

Rule not inflexible as the proverbial laws of the Medes and Persians was said to be, there being exceptions in the application of the rule made in those cases in which (1) there exists distinct and separate grounds for claiming the relief demanded; and (2) where there is a fair and reasonable doubt as to the ability of the plaintiff to safely plead the facts in one form only,—in either of which cases the plaintiff may be permitted to set forth his cause of action in two or more separate and distinct counts or statements,²⁵ and he can not be compelled to elect upon which count he will stand and go to trial.²⁶

²⁴ Strong, J., in *Lackey v. Vanderbilt*, 10 How. Pr. (N. Y.) 155.

²⁵ ARIZ.—*Willard v. Carrigan*, 8 Ariz. 70, 72, 68 Pac. 538. CAL.—*Wilson v. Smith*, 61 Cal. 209, 211; *Remy v. Olds*, 4 Cal. Unrep. 240, 21 L. R. A. 645, 34 Pac. 216; *Rucker v. Hall*, 105 Cal. 425, 38 Pac. 962; *Van Lue v. Wahrlich-Cornett Co.*, 12 Cal. App. 749, 751, 108 Pac. 717. COLO.—*Leonard v. Roberts*, 20 Colo. 88, 90, 36 Pac. 880; *Rucker v. Omaha & Grant Smelting & Ref. Co.*, 18 Colo. App. 487, 490, 72 Pac. 682; *Vindicator Consol. Gold Min. Co. v. Firstbrook*, 36 Colo. 498, 10 Ann. Cas. 1108, 86 Pac. 313; *Cripple Creek Min. Co. v. Brabant*, 37 Colo. 423, 87 Pac. 794; *Cripple Creek Min. Co. v. Esteb*, 37 Colo. 431, 87 Pac. 796. IDAHO.—*Spotswood v. Morris*, 10 Idaho 129, 137, 77 Pac. 216. N. Y.—*Jones v. Palmer*, 1 Abb. Pr. 442; *Birdseye v. Smith*, 32 Barb. 221; *Velle v. Newark City Ins. Co.*, 65 How. Pr. 1, 12 Abb. N. C. 309, 3 N. Y. Civ. Proc. Rep. 202; *Talcott*

v. Van Vechten, 65 How. Pr. 5, 12 Abb. N. C. 314, 3 N. Y. Civ. Proc. 207; affirmed, 25 Hun 565; *Longprey v. Yates*, 31 Hun 432. N. D.—*Norbeck & Nicholson Co. v. Pease*, 21 N. D. 37, 112 N. W. 1136. OKLA.—*Mellon v. Fulton*, 22 Okla. 638, 19 L. R. A. (N. S.) 960, 98 Pac. 912. UTAH.—*Oberndorfer v. Moyer*, 30 Utah 332, 84 Pac. 1105; *Foulger v. McGrath*, 34 Utah 92, 25 Pac. 1006. WIS.—*Whitney v. Chicago & N. W. R. Co.*, 27 Wis. 327; *La Pointe County Supervisors v. O'Malley*, 46 Wis. 35, 50 N. W. 521.

See, also, Bliss on Code Pleading, § 120; Boone on Code Pleading, § 36; Pomeroy on Code Remedies and Remedial Rights, § 576.

²⁶ *Willard v. Carrigan*, 8 Ariz. 70, 73, 68 Pac. 538; *Wilson v. Smith*, 61 Cal. 209, 211; *Van Lue v. Wahrlich-Cornett Co.*, 12 Cal. App. 749, 751, 108 Pac. 717.

Norbeck & Nicholson Co. v. Pease, 21 S. D. 371, 112 N. W. 1136.

Compare: *Harvey v. Southern*

*Proper method of taking objection to a complaint in which a single cause of action is set forth in two or more counts, is not by demurrer, either general or special, but by motion to compel the plaintiff to elect upon which count he will stand and proceed to trial, and to strike out all other counts.*²⁷ In those cases in which there exists a reasonable doubt as to the sufficiency of the complaint were either of the counts stricken out, the whole complaint will be set aside.²⁸ Upon the making of a motion to compel an election of counts, the first count in the complaints stands as the one upon which trial must be had, unless the plaintiff selects and designates another²⁹; and if no objection is taken to any remaining counts, they will be treated as surplusage.³⁰

§ 831. JOINDER OF CAUSES OF ACTION—IN CALIFORNIA. The procedural codes in all the jurisdictions which have adopted the reformed judicature, have provisions regulating the joinder of causes of action in the same complaint, which provisions differ in details. In California, and in most of the code states, it is provided that the plaintiff may unite several causes of action in the same complaint, where they all arise out of: (1) Contracts, expressed or implied; (2) claims to recover specific real

Pac. Co., 46 Ore. 505, 511, 80 Pac. 1061.

²⁷ IND.—Rogers v. Smith, 17 Ind. 323, 79 Am. Dec. 483. N. Y.—Gardner v. Locke, 2 N. Y. Civ. Proc. Rep. 252; Hepburn v. Babcock, 9 Abb. Pr. 159, note; Fern v. Vanderbilt, 13 Abb. Pr. 72; Stockbridge Iron Co. v. Mellen, 5 How. Pr. 459; Lackey v. Vanderbilt, 10 How. Pr. 155, 161; Young v. Edwards, 11 How. Pr. 201; Dickens v. New York Cent. R. Co., 13 How. Pr. 228; Hillman v. Hillman, 14 How. Pr. 456; Cheney v. Fisk, 22 How. Pr. 236. OHIO—Sturges v. Burton, 8 Ohio St. 215,

72 Am. Dec. 582; Ferguson v. Gilbert, 16 Ohio St. 88. WIS.—Muzzy v. Ledlie, 23 Wis. 445.

²⁸ Whittier v. Bates, 2 Abb. Pr. (N. Y.) 477; Slipperly v. Troy & B. R. Co., 9 How. Pr. (N. Y.) 83; Churchill v. Churchill, 9 How. Pr. (N. Y.) 552; Dunning v. Thomas, 11 How. Pr. (N. Y.) 281.

²⁹ Stockbridge Iron Co. v. Mellen, 5 How. Pr. (N. Y.) 459; Hepburn v. Babcock, 9 Abb. Pr. (N. Y.) 159, note.

³⁰ Ferguson v. Gilbert, 16 Ohio St. 88, 91.

As to surplusage and unnecessary matter, see, ante, § 728.

property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same; (3) claims to recover specific personal property, with or without damages for the withholding thereof; (4) claims against a trustee by virtue of a contract, or by operation of law; (5) injuries to character; (6) injuries to person; (7) injuries to property; (8) claims arising out of the same transaction, or transactions connected with the same subject of action, and not included in one of the foregoing subdivisions.¹

Causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated. But an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person.²

—*In actions brought by husband and wife*, to recover for damages caused by any injuries to the wife, all consequential damages suffered and sustained by the husband alone, including the loss of services of his wife, moneys expended and indebtedness incurred by reason of such injury to the wife, may be alleged and recovered without separately stating such cause of action arising out of such consequential damages suffered or sustained by the husband.³

—*Causes of action for injuries to person and injuries to property*, growing out of the same tort, may be joined in the same complaint, and it is not required that they be stated separately.⁴

§ 832. — CAUSES OF ACTION WHICH CAN BE JOINED. In construing the provisions of the California procedural code regulating the joinder of causes of action, set out in

¹ Kerr's Cyc. Cal. Code Civ. Proc., 2d ed., § 427; Biennial Supp. 1915, p. 3065.

² Id.

³ Amendment adding April 10, 1915, Biennial Supp. 1915, p. 3065.

⁴ Id.

the preceding section, and other procedural codes with the same, or essentially similar, provisions, it has been held that causes of action arising out of the same transaction, against the same parties, where all the defendants are interested in the same claim of right, and where the relief asked for in relation to each is of the same general character, may in general be united.¹ This construction is in harmony with the rule in equity practice under the former system of judicature, permitting complainant to join, in the same bill, two good causes of complaint or action, arising out of the same transaction, where all the defendants are interested in the same claim of right, and the relief asked for each is of the same nature;² and according to which rule a bill is not multifarious when it sets out one sufficient ground for equitable relief with another claim containing no equity, on its face, entitling the complainant either to discovery or relief,³—that is, to render a bill multifarious it must contain two good causes of action which can not be united.⁴ Thus, an action for dam-

¹ *Jones v. Steamship Cortes*, 17 Cal. 487, 79 Am. Dec. 142; *Pfister v. Dacey*, 65 Cal. 403, 4 Pac. 303; *Stock-Growers' Bank v. Newton*, 13 Colo. 245, 22 Pac. 444; *First Nat. Bank v. Hummel*, 14 Colo. 259, 23 Pac. 986; *Farrell v. Forest Invest. Co. (Fla.)*, 1 A. L. R. 25, 74 So. 216; *Walters v. Stevenson*, 13 Nev. 164; *Emerson v. Nash*, 124 Wis. 369, 109 Am. St. Rep. 944, 70 L. R. A. 326, 102 N. W. 921; *Manning v. Galland-Henning Pneumatic Malting Dry Mfg. Co.*, 141 Wis. 202, 18 Ann. Cas. 976, 124 N. W. 291; *McArthur v. Moffett*, 143 Wis. 571, 33 L. R. A. (N. S.) 268, 128 N. W. 445.

As to joinder of causes of action; see notes 59 Am. St. Rep. 707; 67 Am. St. Rep. 357.

Consolidation of actions may be ordered by the trial court.—*Smith v. Smith*, 80 Cal. 324, 21 Pac. 4, 22 Pac. 186, 594.

² *Thomas v. Mason*, 8 Gill (Md.) 1; *Abbot v. Johnson*, 32 N. H. 9.

Relief on equitable and on legal ground sought, does not render a bill multifarious.—*Carpenter v. Hall*, 18 Ala. 439; *Pleasants v. Glasscock*, 1 Smed. & M. Ch. 17; *Bassett v. Warner*, 23 Wis. 673.

³ See *Varick v. Smith*, 5 Pal. Ch. (N. Y.) 137, 28 Am. Dec. 417. See *Smith v. McLain*, 11 W. Va. 654.

⁴ *White v. Kuntz*, 13 Daly (N. Y.) 286; affirmed 107 N. Y. 518, 1 Am. St. Rep. 886, 14 N. E. 423. See: *Brownlee v. Lockwood*, 20 N. J. Eq. (1 Spenc.) 239; *Rutherford v. Alyea*, 53 N. J. Eq. 580, 32 Atl. 70.

ages and also for a penalty, in a suit against a sheriff for a failure to execute process, may be united.⁵ A complaint in ejectment may be for two separate and distinct pieces of land, but the two causes of action must be separately stated, and affect all the parties to the action, and not require different places of trial.⁶ And under our system a cause of action in tort may be united with a cause of action on contract, if the two causes of action arise out of the same transaction.⁷ Under the Utah statute,⁸ providing for the joinder of several causes of action arising out of injuries to property, the plaintiff may unite two causes of action, each for the killing of the same horse, charged in different ways.⁹ A count in indebitatus assumpsit, framed substantially as required at common law, is now held to be a sufficient compliance with the Code mandate as to allegations of fact.¹⁰ And among causes of action which may be properly joined are the following: A cause of action for the cancellation of a deed to real property with an action for the possession of the same property.¹¹ A paragraph of complaint seeking to recover the possession of real estate may be joined with another claiming damages for its detention;¹² or a paragraph of

⁵ *Pearkes v. Freer*, 9 Cal. 642.

⁶ *Boles v. Cohen*, 15 Cal. 151.

⁷ *Jones v. Steamship Cortes*, 17 Cal. 487, 79 Am. Dec. 142; *McKenzie v. Hatton*, 6 Misc. (N. Y.) 153, 26 N. Y. Supp. 873; reversed on another point 9 Misc. 16, 29 N. Y. Supp. 18; *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582.

⁸ Utah Comp L. 1888, § 2349.

⁹ *Jensen v. Union Pac. R. Co.*, 6 Utah 253, 21 Pac. 994.

¹⁰ *Ball v. Fulton County*, 31 Ark. 379; *Gale v. James*, 11 Colo. 540, 19 Pac. 446; *Campbell v. Shiland*, 14 Colo. 491, 23 Pac. 324; *McManus v. Ophir Silver Min. Co.*, 4 Nev. 15.

Complaint for labor and services, which alleges an indebtedness in a sum certain therefor, but omits to allege specifically the value of such services, or a promise to pay therefor, merely states a conclusion of law.—*Victor Min. & Mill. Co. v. Justices' Court*, 18 Nev. 31, 1 Pac. 831.

¹¹ *Stock-Growers' Bank v. Newton*, 13 Colo. 245, 22 Pac. 444.

¹² *Locke v. Peters*, 65 Cal. 161, 3 Pac. 657; *Furlong v. Cooney*, 72 Cal. 322, 14 Pac. 12; *Langsdale v. Woolen*, 120 Ind. 16, 21 N. E. 659.

Damage to other lands belonging to plaintiff can not be recovered in an action to recover spe-

complaint to recover damages for conversion may be joined with a paragraph to recover possession of the same property;¹³ trespass to real estate by undermining a house, and case for injury to the personal property in it, are joinable if the proof is the same for both;¹⁴ unpaid subscriptions and the stockholders' individual liability may both be pursued by a judgment creditor in the same action;¹⁵ a cause of action for damages for several breaches of the terms of an express contract, and a cause of action on a quantum meruit for work and labor performed and materials furnished, may be united in the same complaint;¹⁶ so, a cause of action for work and labor performed by the plaintiff for the defendant, and a cause of action for work and labor performed for the defendant by an assignor of the plaintiff, may be united in the same complaint;¹⁷ a cause of action to recover back money paid by mistake of fact rests upon an implied contract, and may be joined with a cause of action upon an express contract for the recovery of rent upon premises leased;¹⁸ an

cific real property and damages for the withholding thereof.—*Furlong v. Cooney*, 72 Cal. 322, 14 Pac. 12.

Measure of damages caused by wrongful detention of real property is deemed to be the value of the use of the property for the time of such occupation, not exceeding five years next preceding the commencement of the action, and the costs, if any, of recovering the possession.—*Furlong v. Cooney*, 72 Cal. 322, 329, 14 Pac. 12.

Interest may also be allowed when necessary to a complete indemnity.—*Id.*; *Haggin v. Clark*, 51 Cal. 112; *Vandevoort v. Gould*, 36 N. Y. 646, 3 Transc. App. 57.

See, also, *Kerr's Cyc. Cal. Civ. Code*, §§ 3287, 3334.

Trespass for mesne profits can be recovered only after, or contemporaneously with a judgment for possession.—*Locke v. Peters*, 65 Cal. 161, 3 Pac. 657.

¹³ *Baals v. Stewart*, 109 Ind. 371, 9 N. E. 403.

¹⁴ *Henshaw v. Noble*, 7 Ohio St. 226.

¹⁵ *Warner v. Callender*, 20 Ohio St. 190.

¹⁶ *Remy v. Olds*, 88 Cal. 537, 26 Pac. 355; *Cowan v. Abbott*, 92 Cal. 100, 28 Pac. 213; *Waggy v. Scott*, 29 Ore. 386, 45 Pac. 774; *Holm v. Chicago, M. & S. P. R. Co.*, 59 Wash. 293, 109 Pac. 799.

¹⁷ *Fraser v. Oakdale Lumber & Water Co.*, 73 Cal. 187, 14 Pac. 829.

¹⁸ *Olmstead v. Dauphiny*, 104 Cal. 635, 38 Pac. 505.

injunction, and incidentally thereto an account of damages, may be sought in the same action;¹⁹ and where a purchaser at execution sale brought an action to set aside certain conveyances alleged to have been fraudulently made by the judgment debtor, and to recover possession of the property, there was held to be no misjoinder of causes of action.²⁰

§ 833. — CAUSES OF ACTION WHICH CAN NOT BE JOINED. Those causes of action which arise under different classes of action provided in the California procedural code, as heretofore set out,¹ can not be joined in the same action; and inconsistent actions can not be united in the same complaint.² Nor can the pleader under the present system, any more than under the old, ask for two or more distinct kinds of relief, inconsistent with or repugnant to each other.³ Thus, an action in ejectment for breach of condition, with damages for breach of covenant, is deemed incompatible.⁴ So, an action in ejectment against vendor, and an equitable claim that vendor execute a conveyance, can not in general be united.⁵

Bill in equity is multifarious when several matters are united against one defendant, which are perfectly distinct and unconnected, or when relief is demanded against several defendants of several matters of a distinct and independent nature;⁶ e. g., in an action against trustees of two

¹⁹ *Convers v. Hawkins*, 31 Ohio St. 209.

²⁰ *Pfister v. Dascey*, 65 Cal. 403, 4 Pac. 393.

¹ See, ante, § 831.

² 1 *Van Santv. Eq. Pl.* 54, 55; *Linden v. Hepburn*, 5 N. Y. Super. Ct. Rep. (3 Sandf.) 668, 3 N. Y. Code Rep. 165, 5 How. Pr. 188, 9 N. Y. Leg. Obs. 80.

Compare: *Krower v. Reynolds*, 99 N. Y. 245, 1 N. E. 775.

³ 1 *Van Santv. Eq. Pl.* 55.

⁴ *Underhill v. Saratoga & W. R. Co.*, 20 Barb. (N. Y.) 455.

⁵ *Lattin v. McCarty*, 8 Abb. Pr. (N. Y.) 225, 17 How. Pr. 289; reversed on another point in 41 N. Y. 107.

Ejectment and equitable relief generally, see *Onderdonk v. Mott*, 34 Barb. (N. Y.) 106.

⁶ *Wilson v. Castro*, 31 Cal. 420, 428; *Stewart v. Smith*, 6 Cal. App. 157, 91 Pac. 669.

separate estates.⁷ Claim for equitable relief against a corporation and one for damages against individual directors are incapable of joinder;⁸ and where the interests of the defendants are several, as in case of the several purchasers of securities, in an equitable suit to compel their surrender, the causes of action against the several purchasers can not be united.⁹

*Cause of action based upon fraud, malice, and oppression of defendant, and a cause of action arising from a breach of a covenant of warranty of property conveyed, can not be united in the same complaint.*¹⁰

*Claim for the possession of real property, with damages for its detention, can not be joined in the same complaint, under any system of pleading, with a claim for consequential damages arising from a change of road, by which a tavern-keeper may have been injured in his business.*¹¹ A complaint which joins an action of "trespass quare clausum fregit," ejectment, and prayer for relief in equity, will be held bad on demurrer.¹² So, claims for

⁷ Vall v. Mott, 37 Barb. (N. Y.) 208.

⁸ House v. Cooper, 30 Barb. (N. Y.) 157, 16 How. Pr. 292.

⁹ See Austin v. Munro, 4 Lans. (N. Y.) 360; affirmed, 47 N. Y. 360; Lexington & B. S. R. Co. v. Goodman, 25 Barb. (N. Y.) 469, 5 Abb. Pr. 493, 15 How. Pr. 85; Hess v. Buffalo & N. F. R. Co., 29 Barb. (N. Y.) 391; Clark v. Coles, 50 How. Pr. 178.

¹⁰ Cosgrove v. Fisk, 90 Cal. 75, 76, 27 Pac. 56.

¹¹ Bowles v. Sacramento Turnpike Co., 5 Cal. 224.

¹² Bigelow v. Gove, 7 Cal. 133; Marius v. Bicknell, 10 Cal. 217; Nevada County & Sacramento Canal Co. v. Kidd, 37 Cal. 282, 308, 316, 317; Nevada County & Sacramento Canal Co. v. Kidd, 43

Cal. 180, 184; Pfister v. Dascey, 65 Cal. 403, 405, 4 Pac. 393; Reynolds v. Lincoln, 71 Cal. 183, 190, 9 Pac. 176, 12 Pac. 449; Budd v. Bingham, 18 Barb. (N. Y.) 494; Hotchkiss v. Auburn & Rochester R. Co., 36 Barb. (N. Y.) 600; Cowenhoven v. Brooklyn, City of, 38 Barb. (N. Y.) 9.

Demurrer for misjoinder erroneously overruled, judgment on merits will be set aside by appellate court.—Bigelow v. Gove, 7 Cal. 133; Dyer v. Barstow, 50 Cal. 652; Brown v. Rice, 51 Cal. 489; Reynolds v. Lincoln, 71 Cal. 183, 190, 9 Pac. 176, 12 Pac. 449.

Diversion of water and Injunction united in one action, upheld in Weaver v. Conger, 10 Cal. 233, 237.

Rules of construction will not

¹ Code Pl. and Pr.—75

injury to personal property, and for its possession, can not be united.¹³ Enforcement of equitable lien, and demand for possession in replevin, can not be united.¹⁴

Complaint setting forth liability, partly joint and partly several, as respects the respective defendants, is fatally defective.¹⁵ Or a claim arising out of joint liability on contract, with claim for joint and several liability sounding in tort.¹⁶ Nor can an action be maintained against a defendant as sole debtor on one contract and joint debtor on another.¹⁷

Count in assumpsit and a count in tort may not be joined in the same complaint; where they are, upon the trial the plaintiff may be compelled to elect upon which he will proceed to trial;¹⁸ because the statutory provision permitting causes of action arising out of the same transaction to be joined, does not apply to claims of an inconsistent nature.¹⁹ But in California²⁰ and Ohio,²¹ and perhaps elsewhere, where both causes of action arise out of the same transaction, or transactions connected with the same subject of action, they may be joined in

be resorted to by court to determine relief demanded in complaint.—*Bigelow v. Gove*, 7 Cal. 133, 135; *Nevada County & Sacramento Canal Co.*, 37 Cal. 282, 304.

¹³ *Spalding v. Spalding*, 1 N. Y. Code Rep. 64, 3 How. Pr. 297; *Smith v. Hallock*, 8 How. Pr. (N. Y.) 73.

¹⁴ *Otis v. Sill*, 8 Barb. (N. Y.) 102.

¹⁵ *Lewis v. Acker*, 11 How. Pr. (N. Y.) 163.

¹⁶ *Harris v. Schultz*, 40 Barb. (N. Y.) 315.

¹⁷ *Warth v. Radde*, 18 Abb. Pr. (N. Y.) 396, 28 How. Pr. 230; *Barnes v. Smith*, 24 N. Y. Super.

Ct. Rep. (1 Rob.) 699, 16 Abb. Pr. 420.

¹⁸ *Childs v. Bank of Missouri*, 17 Mo. 213; *Lackey v. Vanderbilt*, 10 How. Pr. (N. Y.) 155; *Dunning v. Thomas*, 11 How. Pr. (N. Y.) 281; *Ford v. Mattice*, 14 How. Pr. (N. Y.) 91; *Noble v. Laley*, 50 Pa. St. 281.

¹⁹ *McClure v. Wilson*, 13 App. Div. (N. Y.) 274, 43 N. Y. Supp. 209.

²⁰ See, ante, 831, clause (8).

²¹ *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582, although it was otherwise in this state before the adoption of the procedural code.—See *Nunocks v. Inks*, 17 Ohio 596.

the same complaint.²² It is held in Pennsylvania that a count in assumpsit can not be joined with a count for a deceit; and where added after an award of arbitrators, and an appeal therefrom by the defendant, under a declaration containing a count for deceit only, it was properly stricken off by the court on the trial.²³

Counts in debt and covenant can not be joined. Such a declaration is bad on general demurrer.²⁴ A claim on a demand for money had and received can not be joined with a claim to compel the delivery up of notes.²⁵ It seems that the vendor can not unite in the same action a claim against a broker for damages for fraudulent sale of land with a claim against a purchaser for reconveyance or accounting.²⁶ So, a landlord can not demand an injunction against a breach of covenant in the same action in which he demands a forfeiture of the lease; such reliefs are inconsistent.²⁷

Count in action ex contractu and count ex delicto can not be united in the same complaint,²⁸ as the distinction between actions growing out of torts and those growing out of contracts must still be preserved;²⁹ although, as

²² See *Gray v. Dougherty*, 25 Cal. 266, 277; *More v. Massini*, 32 Cal. 596.

In Utah the rule is otherwise.— See *Ferguson v. Burt*, 2 Utah 388, 392.

²³ *Pennsylvania R. Co. v. Zug*, 47 Pa. St. 480.

²⁴ *Brumbaugh v. Keith*, 31 Pa. St. 327.

²⁵ *Cahoon v. Bank of Utica*, 3 N. Y. Code Rep. 110, 4 How. Pr. 423; affirmed, 7 How. Pr. 134 (but see 7 N. Y. 486, 7 How. Pr. 401, *Sheld. Notes* 31); *Alger v. Scoville*, 1 N. Y. Code Rep. N. S. 303, 6 How. Pr. 131.

Arising out of same transaction, or transactions connected with the same subject of action, the rule is

different under the provision of some of the procedural codes. See footnotes 20-22 this section.

²⁶ *Gardner v. Ogden*, 22 N. Y. 327; 78 Am. Dec. 192.

²⁷ *Linden v. Hepburn*, 5 N. Y. Super. Ct. Rep. (3 Sandf.) 668, 5 How. Pr. 188, 9 N. Y. Leg. Obs. 80.

²⁸ See *Rittenhouse v. Knoop*, 9 Ind. App. 126, 36 N. E. 384; *White v. Snell*, 22 Mass. (5 Pick.) 425; *Boston, City of, v. Otis*, 37 Mass. (20 Pick.) 41; *Corbett v. Wren*, 25 Ore. 305, 35 Pac. 658.

²⁹ *Carson River Lumbering Co. v. Bassett*, 2 Nev. 249; *Knickerbocker v. Hall*, 3 Nev. 194.

As to rule in suits on contracts. See, post, §§ 834, 835.

we have already seen, the rule is different in California and Ohio, and perhaps elsewhere, where the two causes of action arise out of the same transaction, or transactions connected with the same subject of action.³⁰ It has been held, however, that a party whose property has been wrongfully taken, may waive the tort and sue in assumpsit;³¹ although the contrary is held in some cases.³² But whichever ground of recovery the pleader adopts, the substantial allegations of the complaint in a given case must be the same under our practice as were required at the common law.³³

*Husband and wife may join in suit for her services, but when they sue together he can not join a claim of his own.*³⁴

*Individual and representative claims can not properly be joined in the same action.*³⁵ Complainant can not unite in one bill a demand that defendant account individually for moneys received by him with a demand that he account as administrator or trustee.³⁶ So, a claim against

³⁰ See footnotes 20-22 this section.

³¹ *Eversole v. Moore*, 66 Ky. (3 Bush.) 49.

As to election between contract and tort, see, ante, § 556.

³² *Ladd v. Rogers*, 93 Mass. (11 Allen) 209. See *Terry v. Munger*, 121 N. Y. 161, 18 Am. St. Rep. 803, 8 L. R. A. 216, 24 N. E. 272, affirming 49 Hun 560, 2 N. Y. Supp. 348.

³³ *Miller v. Van Tassel*, 24 Cal. 458, 463.

³⁴ See, ante, §§ 622-624; *Avogadro v. Bull*, 4 E. D. Smith (N. Y.) 384.

Husband must sue to recover wife's earnings, in absence of agreement making such earnings her separate property.—*Moseley*

v. Heney, 66 Cal. 478, 6 Pac. 134; *Reade v. De Lea*, 14 N. M. 442, 451, 95 Pac. 131, 133.

³⁵ *Voorhis v. Childs*, 17 N. Y. 354; *Hall v. Fisher*, 20 Barb. (N. Y.) 441; *Lucas v. New York Cent. R. Co.*, 21 Barb. (N. Y.) 245; *Tracy v. Suydam*, 30 Barb. (N. Y.) 110; *Gridley v. Gridley*, 33 Barb. (N. Y.) 250; reversed on another point, 24 N. Y. 130; *Buckham v. Brett*, 22 How. Pr. (N. Y.) 233; *Higgins v. Rockwell*, 9 N. Y. Super. Ct. Rep. (2 Duer) 650.

³⁶ See *Burt v. Wilson*, 28 Cal. 632, 639; *Latting v. Latting*, 4 Sandf. Ch. (N. Y.) 31; *Bartlett v. Hatch*, 17 Abb. Pr. (N. Y.) 461; *Warth v. Radde*, 18 Abb. Pr. (N. Y.) 396, 28 How. Pr. 230.

surviving partners and executors of deceased partners can not be united unless the survivor is insolvent.³⁷

Infant coming of age, seeking to avoid two separate grants to different persons, and to recover possession, can not bring both in one action.³⁸

Lessee and his surety can not be united in the same suit.³⁹

Sheriff and his official bondsmen sued, the complaint alleging a cause of action against the sheriff in trespass only,—a tort,—and against his sureties as signers of the bond, and not otherwise, is a misjoinder not only of causes of action but also of parties.⁴⁰

Suit on a recognizance given before a justice, for the appearance of the defendant to answer a criminal charge; the complaint, after setting out the cause of action on the recognizance, avers that the defendant, S, to secure his sureties, executed a trust deed to T of certain warrants and money. This deed provides that in case the recognizance be forfeited and the sureties become liable thereon, the trustee is to apply the property to the payment thereof, so far as it will go. The complaint asks to have this property so applied. It is a misjoinder of causes of action, the trust deed having nothing to do with the liability of the sureties.⁴¹

³⁷ *McVean v. Scott*, 46 Barb. (N. Y.) 379.

³⁸ *Voorhies v. Voorhies*, 24 Barb. (N. Y.) 150.

³⁹ *Phalen v. Dingee*, 4 E. D. Smith (N. Y.) 379; *Tibbitts v. Percy*, 24 How. Pr. (N. Y.) 39.

⁴⁰ *Ghirardelli v. Bourland*, 32 Cal. 585, 588; *Hoyce v. Raymond*, 25 Kan. 667; *Sanders v. Cline*, 22 Okla. 154, 164, 101 Pac. 271; *Clin-ton v. Nelson*, 2 Utah 284.

Wrongful act in official capacity stated in the complaint, the plead-

ing would be sufficient and the causes of action properly joined.—*Sam Yuen v. McMann*, 99 Cal. 497, 499, 4 Pac. 80; *Thompson v. Gatlin*, 7 C. C. A. 351, 58 Fed. 534.

⁴¹ *People v. Skidmore*, 17 Cal. 260.

Indemnifying bail in criminal cases is not against public policy.—*Essig v. Turner*, 60 Wash. 178, 110 Pac. 1000.

As to validity of agreement to indemnify bail in a criminal case. See 20 L. R. A. (N. S.) 59.

§ 834. ——— ACTION ON CONTRACT AND FOR INJURY TO PERSON OR PROPERTY, ETC. It being essential that causes of action united in the same complaint shall belong to the same class,¹ except in those states heretofore noted,² it follows that actions on contracts and for injury to person or injury to property, are incompatible and can not be united.³ Causes of action to recover damages for alleged injuries to the person and property of the plaintiff, and for false imprisonment of the plaintiff's person, for forcibly ejecting him from a house and premises alleged to have been in plaintiff's possession, and keeping him out of the possession thereof, can not be united.⁴ So, the tort of a husband and separate tort of wife can not be united.⁵ A claim for damages for a personal tort can not be united with a demand properly cognizable in a court of equity in the same action.⁶

A count on contract made by one defendant can not be joined with one made by all defendants.⁷ Two claims, the one against both defendants for recovery of possession of real estate and damages, the other against one only for rents received, no connection existing between the same, can not be joined.⁸

§ 835. ——— ACTIONS FOR BREACH OF CONTRACT AND FOR CONVERSION, ETC. A cause of action for damages for the negligence of the defendant in not taking due and proper care of a sum of money delivered to him at his

¹ See, ante, § 833, footnote 16.

² Id.; footnotes 17-19.

³ Mayo v. Madden, 4 Cal. 27; Thelin v. Stewart, 100 Cal. 372, 34 Pac. 861; Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56; Faust v. Smith, 3 Colo. App. 505, 34 Pac. 261; Benson v. Beatty, 70 Kan. 295, 78 Pac. 847; Hulce v. Thompson, 3 How. Pr. (N. Y.) 113.

⁴ McCarty v. Fremont, 23 Cal. 196, 197.

As to when injuries to both person and property constitute but one cause of action, see, note, 50 L. R. A. 165.

⁵ Malone v. Stilwell, 15 Abb. Pr. (N. Y.) 421.

⁶ Mayo v. Madden, 4 Cal. 27.

⁷ Moore v. Platte County, 8 Mo. 467; Doan v. Hally, 25 Mo. 357.

⁸ Tompkins v. White, 8 How. Pr. (N. Y.) 520.

request, of which he agreed to take proper care, but lost it through his gross carelessness, negligence, and improper conduct, and failed to deliver it upon demand, is a cause of action for breach of contract, and can not be joined with a cause of action for the conversion of the money to the use of the defendant.¹ The owners in severalty of certain distinct parcels of land brought an action to restrain the defendant from depriving them of water carried by various ditches to their respective lands, and to recover damages sustained by reason of past diversions of the water. It was held that the cause of action for damages was several as to each of the plaintiffs, and that it could not be joined with the cause of action for an injunction, which was common to all of them.² Where the complaint in an action against an executor contains several causes of action separately stated, an allegation showing the defendant's representative character need not be contained in each count, one such allegation at the conclusion of the complaint being sufficient.³ In cases where the substantial rights of the parties to an action have not been affected by a misjoinder of causes of action, a judgment rendered after a trial of the case upon its merits should not be reversed because the court overruled a demurrer for such misjoinder.⁴

¹ *Stark v. Wellman*, 96 Cal. 400, 31 Pac. 259; *Jasper v. Hazen*, 2 N. D. 401, 51 N. W. 583.

See, also, discussion, ante, §§ 659, 674, 678 and 701.

² *Barham v. Hostetter*, 67 Cal. 272, 274, 7 Pac. 689. See *Churchill v. Lauer*, 84 Cal. 233, 238, 24 Pac. 107; *Foreman v. Boyle*, 88 Cal. 290, 293, 26 Pac. 94; *First Nat. Bank v. Johnson Land Mortg. Co.*, D. S. B., 17 S. D. 522, 529, 97 N. W. 748, 750.

³ *Moseley v. Heney*, 66 Cal. 478, 6 Pac. 134.

⁴ *Asevado v. Orr*, 100 Cal. 293, 34 Pac. 777.

Demurrer for misjoinder of causes overruled improperly, the objection by demurrer being well taken, is prejudicial error for which judgment will be reversed. — *Reynolds v. Lincoln*, 71 Cal. 183, 191, 9 Pac. 176, 12 Pac. 449; *Stark v. Wellman*, 96 Cal. 400, 31 Pac. 259; *Mallory v. Thomas*, 98 Cal. 644, 646, 33 Pac. 757; *Asevado v. Orr*, 100 Cal. 293, 300, 34 Pac. 777; *Thellin v. Stewart*, 100 Cal. 372, 374, 34 Pac. 861; *Alexander v. Central Lumber & Mill Co.*, 104 Cal. 532, 537, 38 Pac. 410.

—Filing answer does not waive

§ 836. SPLITTING CAUSES OF ACTION OR DEMANDS—IN GENERAL. It has been a well-established rule of law since before the days of Lord Coke, that a person will not be permitted to split a cause of action and bring several suits upon one demand, which can be fully adjudicated and determined in one action.¹ This doctrine rests upon two foundations: (1) The principle of remedial justice expressed in the maxim, *nemo debet bis vexari [si constet curiæ quod sit] pro una et eadem causa*—no man ought to be twice troubled or harassed [if it appear to the court that it is] for one and the same cause;² and, also, (2) upon the other equally well-established principle of the law expressed by the maxim, *circuitus est evitandus*—circuitry of action is to be avoided;³ that is to say, a longer course of proceeding to recover or secure the same right or relief than is needful, is not permitted, and that a multiplicity of suits is to be avoided. Thus, where one can include in a single suit all the items of a demand, he is under obligation to do so, or be barred from maintaining another suit upon the omitted items, under the general doctrine of *res adjudicata*;⁴ and this doctrine applies not

the error in overruling the demurrer.—*Reynolds v. Lincoln*, 71 Cal. 183, 190, 9 Pac. 176, 12 Pac. 449; *Thelin v. Stewart*, 100 Cal. 372, 374, 34 Pac. 861.

Compare: *Alexander v. Central Lumber & Mill Co.*, 104 Cal. 532, 537, 38 Pac. 410.

—Substantial justice not affected thereby, not reversible error.—*Reynolds v. Lincoln*, 71 Cal. 183, 185, 9 Pac. 176, 12 Pac. 449; *Angell v. Hopkins*, 79 Cal. 181, 182, 21 Pac. 729; *Gillasple v. Hagans*, 90 Cal. 90, 94, 27 Pac. 34; *Asevado v. Orr*, 100 Cal. 293, 300, 34 Pac. 777; *Woollacott v. Meekin*, 151 Cal. 701, 706, 91 Pac. 612, 614; *Bollinger v. Bollinger*, 154 Cal. 695, 699, 707, 99 Pac. 196, 198, 201;

Hentig v. Johnson, 8 Cal. App. 221, 224, 96 Pac. 390.

¹ *Bonesteel v. Orvis*, 23 Wis. 506, 99 Am. Dec. 201.

See discussion and authorities, post, § 839.

Motion for judgment on two or more counts, where each count relies on the same cause of action, will be denied; to grant such motion would be like splitting causes of action.—*Parker v. Boston & M. K. Co.*, 84 Vt. 336, 79 Atl. 865.

² *Sperry's Case*, 5 Co. 61a, 77 Eng. Repr. 148.

³ *Coulter's Case*, 5 Co. 30a, 31a, 77 Eng. Repr. 98, 100. See *Wingate's Maxims*, max. 178.

⁴ *Bendernagle v. Cocks*, 19 Wend.

only to causes of action or demands, but also to motions made, or that can be made, during the proceedings in an action, under the well-known maxim, *expressio unius est exclusio alterius*—the express mention of one thing is the exclusion of another.⁵

§ 837. — IN ACTIONS EX CONTRACTU. The principles of remedial jurisprudence set out in the last section are especially applicable to actions ex contractu;¹ a recovery on one item bars all the items that might have been included in the action;² and include not only the cause of action, but also the parties liable on the contract, where the liability is joint and the plaintiff sues severally, taking a several judgment against a portion of the persons liable, this will bar the maintenance of a subsequent action against other persons liable, who were not made parties to the first suit. Where a person holds a series of coupons, notes, chattels or things derived from a common source, any litigation ending in an adjudication as to and concerning any one of such series, establishing certain facts concerning the same, will be binding in any subsequent litigation founded upon or growing out of another of such series, in which the same fact or facts are involved, or are important, the former adjudication will be binding upon

207, 32 Am. Dec. 448; Bullard v. Thorpe, 66 Vt. 599, 44 Am. St. Rep. 867, 25 L. R. A. 605, 30 Atl. 36.

⁵ Bonesteel v. Orvis, 23 Wis. 506, 99 Am. Dec. 201; United States v. California & Oregon Land Co., 192 U. S. 355, 48 L. Ed. 478, 24 Sup. Ct. Rep. 266.

Objections to a claim for relief can not be divided up into several motions, when complete relief can be granted upon one appropriate motion; all known objections or claims for relief against an irregularity not urged in the first mo-

tion are waived.—Bonesteel v. Orvis, 23 Wis. 506, 99 Am. Dec. 201.

Because all that was or might have been heard on a proper motion is concluded.—Aurora, City of, v. West, 74 U. S. (7 Wall.) 82, 19 L. Ed. 42; Kingston, Duchy of, Case of, 20 How. St. Tr. 355-362, 1 Leach. C. C. 140, 1 Smith's Lead. Cas. 734-986.

¹ As to actions ex contractu, see, ante, §§ 525, 632-703.

² Bullard v. Thorpe, 66 Vt. 599, 44 Am. St. Rep. 867, 25 L. R. A. 605, 30 Atl. 36.

the parties, notwithstanding the fact that the subject-matter of the action is different.³ But in those cases in which a contract provides for a series of acts or performances, and such acts or performances are severable, a suit for the breach of each act or performance provided for may be maintained as and at the time when the breach of each successive act or performance occurs, without waiting until the expiration of the term at the end of which all the acts or performances provided for are to be done or performed, and then prosecute in one action for the breach of all,⁴—as would be the case in non-severable contracts. After there has been a breach of each and every separate act or performance, there is but one cause of action.⁵

Defendant bound by the rules and principles above laid down, where they are applicable. Thus, the statutes and procedural codes provide for counter-claims, sets-off, and recoupments in the defendant's favor; but a defendant entitled to present and maintain in an action such counter-claim, set-off or recoupment, must avail himself

³ Gardner v. Buckbee, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256; Cromwell v. County of Sac., 94 U. S. 351, 24 L. Ed. 195.

⁴ Stone v. Bancroft, 139 Cal. 78, 70 Pac. 1017, 72 Pac. 717; Cohen v. Clark, 44 Mont. 151, 119 Pac. 775; Krebs Hop Co. v. Livesley, 59 Ore. 574, 114 Pac. 944, 118 Pac. 165; Harstald v. Olson, 57 Wash. 264, 106 Pac. 741 (contract being severable, plaintiff may sue in one action for all items due at time suit is brought).

Mortgage securing money payable in installments, or notes maturing at different dates, the mortgage may be foreclosed upon the failure to pay an installment or note, and the property sold to

pay the same; but as soon as enough property has been sold to realize sufficient money to pay the amount due, together with interest and costs, the sale must cease, and where the court does not find that other sums are to fall due on designated future dates, on a future default a new action to foreclose may be maintained.—Higgins v. San Diego Sav. Bank, 129 Cal. 184, 61 Pac. 943.

—In Utah, the rule seems to be different, and a party suing on a mortgage to foreclose for one note due, can not thereafter sue on the mortgage.—Bacon v. Raybould, 4 Utah 357, 10 Pac. 481, 11 Pac. 510.

⁵ Whitaker v. Hawley, 30 Kan. 317, 1 Pac. 508; Cohen v. Clark, 44 Mont. 151, 119 Pac. 775.

thereof in the action in which he is entitled to present and press the same; he can not sleep on his rights and allow the plaintiff to recover the full amount of the demand for which he sues, and then, in another suit, maintain an action to recover his own demand,⁶—*circuitus est evitandus*; he will be barred by the decision in the former adjudication, in which he could have presented and set-off his claim against that of the plaintiff, but did not; the whole matter falls within the general doctrine of *res adjudicata*.

§ 838. — IN ACTIONS EX DELICTO. In the case of actions *ex delicto*,¹ a different rule prevails, because of the very nature of the proceeding. As we have already seen, the person injured in an *ex delicto* action may proceed against one, any less than all, or all the parties involved in the tort, or he may prosecute independent actions against each of them, successively,—e. g., where a joint trespass² is charged.³ A person committing a tortious act may be both civilly and criminally liable and punishable for the same act or transaction;⁴ and where more than one person is involved in the tortious act or transaction they may be liable in different degrees or grades of damages, or for exemplary damages and criminal punishment at the same time;⁵ or may violate two or more systems of law in the same act or transaction, and be liable to an action in damages or a criminal prosecution under one or more or all these systems of law.⁶ Finally a man can not prosecute himself,⁷ and by paying a nominal fine, escape a *bona fide* prosecution and sub-

⁶ *Street v. Blay*, 2 Barn. & Ald. 456, 462, 22 Eng. C. L. 193, 196, 109 Eng. Repr. 1212, 1214.

¹ As to actions *ex delicto*, see, ante, § 525, also §§ 632-703.

² As to trespass, see, ante, § 702.

³ *Kirkwood v. Miller*, 37 Tenn. (5 Sneed) 455, 73 Am. Dec. 134.

⁴ *White v. Fort*, 10 N. C. 251.

⁵ *Merest v. Hervey*, 5 Taunt. 442, 1 Eng. C. L. 230, 128 Eng. Repr. 761.

⁶ *Hughes v. People*, 8 Colo. 536, 5 Am. Cr. Rep. 80, 7 Cr. L. Mag. 280, 9 Pac. 50.

⁷ A person can not be both plaintiff and defendant, see, ante, § 632.

stantial punishment by the imposition of an appropriate penalty; that is, he can not bar a real prosecution.⁸

Single wrongful or tortious act, however, can be made the ground of but a single suit; it can not be divided up into different suits, however numerous the items of damage may be;⁹ and it is improper pleading to set forth each item of injury as a separate cause of action.¹⁰

§ 839. — APPLICATIONS AND ILLUSTRATIONS OF THE RULE. We have already seen the reason why the law does not permit a creditor to split his cause of action or demand into two or more suits;¹ and under this rule the law does not permit a creditor to assign his claim or debt in parcels, and thus by splitting up the cause of action subject his debtor to costs and expenses of several suits.² But although such assignment is not good at law without consent of the debtor, it is valid in equity, and in an action thereon it is not necessary to aver consent. So a promis-

⁸ *Walkins v. State*, 68 Ind. 427, 34 Am. Rep. 273.

⁹ *Wichita & W. R. Co. v. Bebee*, 39 Kan. 465, 18 Pac. 465; *Kansas City, M. & O. R. Co. v. Shutt*, 24 Okla. 96, 138 Am. St. Rep. 780, 20 Ann. Cas. 255, 104 Pac. 51.; *Hazard Powder Co. v. Volger*, 3 Wyo. 189, 18 Pac. 636.

¹⁰ *Hazard Powder Co. v. Volger*, 3 Wyo. 189, 18 Pac. 636.

¹ See, ante, § 836. See, also, *Pueblo, City of, v. Dye*, 44 Colo. 35, 96 Pac. 969; *Wichita & W. R. Co. v. Bebee*, 39 Kan. 465, 18 Pac. 465; *Tootle v. Wells*, 39 Kan. 452, 18 Pac. 692; *German Fire Ins. Co. v. Bullene*, 51 Kan. 764, 33 Pac. 467; *Tootle v. Kent*, 12 Okla. 674, 73 Pac. 310.

Balance due on account, running for more than two years, constitutes but one cause of ac-

tion.—*Tootle v. Wells*, 39 Kan. 452, 18 Pac. 692.

Breach of different agreement from that on which former suit based, question of splitting a cause of action can not arise.—*Holt v. Neilson*, 37 Utah 566, 109 Pac. 470.

Sheriff seizing and selling part of property, where the action is wrongful, owner may maintain replevin for the property still in the sheriff's hands, and trover for the property sold.—*Gehlert v. Quinn*, 35 Mont. 451, 119 Am. St. Rep. 864, 90 Pac. 168.

² *Marzlou v. Ploche*, 8 Cal. 522, 536; *Grant v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423; *Phillips v. Edsall*, 127 Ill. 535, 536, 20 N. E. 801; *Canty v. Latterner*, 31 Minn. 239, 17 N. W. 385; *Little v. Portland, City of*, 26 Ore. 235, 243, 37 Pac. 911.

sory note can not be the foundation of two suits, each for a part of the note.³ But there is no case or dictum requiring a party to join in one action several distinct causes of action. The plaintiff may elect to sue upon them separately,⁴ even when they belong to the class of causes which might be joined, provided their identity is not the same.⁵ But an attorney suing for services must include his entire demand in one action.⁶ So a joint cause of action vested in two or more can not be split.⁷ But any demand may be split with the consent or assent of the defendant.⁸

The failure to join several causes of action arising out of the same transaction may sometimes operate as a bar to the subsequent assertion of the omitted demands;⁹ and the same rule applies in the case of a claim against the county.¹⁰ Thus in a suit in trover for the recovery of bed-quilts, when bed and bed-quilts were taken at the same time, a recovery of the quilts was a bar to an action for the recovery of the bed.¹¹ So an action for recovery of one barrel of potatoes was a bar to a suit for the recovery of two barrels, all sold at the same time.¹² So, in case of sale of hay under a contract, to be

³ *Miller v. Covert*, 1 Wend. (N. Y.) 487.

⁴ *Phillips v. Berick*, 16 Johns. (N. Y.) 140, 8 Am. Dec. 299; *Secor v. Sturgis*, 16 N. Y. 554, affirming 2 Abb. Pr. 69.

⁵ *Staples v. Goodrich*, 21 Barb. (N. Y.) 317.

⁶ *Beekman v. Plantner*, 15 Barb. (N. Y.) 550.

⁷ *Coster v. New York & E. R. Co.*, 13 N. Y. Super. Ct. Rep. (6 Duer) 43, 46, 3 Abb. Pr. 332.

⁸ *Cornell v. Cook*, 7 Cow. (N. Y.) 310; *Secor v. Sturgis*, 16 N. Y. 559, affirming 2 Abb. Pr. 69.

⁹ *Zirker v. Hughes*, 77 Cal. 235,

19 Pac. 423; *Wakerly v. Bacon*, (dis. op.) 85 Cal. 137, 142, 24 Pac. 638; *Lehmann v. Schmidt*, 87 Cal. 15, 22, 25, 161; *Cooley v. Calaveras County*, 121 Cal. 482, 485, 53 Pac. 1075; *Phillips v. Berick*, 16 Johns. (N. Y.) 136, 8 Am. Dec. 299; *Bendernagle v. Cocks*, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; *Hoff v. Myers*, 42 Barb. 270; *Rawlins, City of, v. Jungquist*, 16 Wyo. 403, 420, 94 Pac. 464, 467, 96 Pac. 144.

¹⁰ *Zirker v. Hughes*, 77 Cal. 235, 19 Pac. 423.

¹¹ *Farrington v. Payne*, 15 Johns. (N. Y.) 432.

¹² *Smith v. Jones*, 15 Johns. (N. Y.) 229.

delivered in parcels.¹³ So, also, judgment in an action for breach of one covenant of a lease is a bar to a recovery on the breach of another covenant in the same lease, committed before the first suit was commenced.¹⁴ The general rule of the common law is, that if a single cause is split up, and two or more actions are brought upon it, a judgment entered in one of them is held to be *res adjudicata* as to the whole cause of action, and will be a bar to the maintenance of the others.¹⁵ But the legislature of Nevada has changed this rule in tax cases,¹⁶ and the defenses which a defendant in an action to recover taxes may make by answer no longer include that of a former recovery.¹⁷

§ 840. IN ACTION OF DEBT—IN GENERAL. Strictly speaking, a debt is that which is due from one person to another, whether the obligation is in money, goods or services; that which one person is bound to pay or render to another or to perform for his benefit; that of which payment is liable to be exacted; an obligation, a liability.¹

In common parlance and in law by “debt” is usually understood a sum of money due upon a contract, express or implied.² Standing alone, the word “debt” is as

¹³ *Miller v. Covert*, 1 Wend. (N. Y.) 487.

¹⁴ *Bendernagle v. Cocks*, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; *Stuyvesant v. New York, City of*, 11 Pal. Ch. (N. Y.) 414, affirming 1 N. Y. Leg. Obs. 101.

¹⁵ *Freeman on Judgm.*, § 238.

¹⁶ *Nevada Gen. Stats.*, § 1108.

¹⁷ *State v. Central Pac. R. Co.*, 21 Nev. 260, 30 Pac. 689.

¹ CONN.—*Cook v. Bartholomew*, 60 Conn. 24, 13 L. R. A. 452, 22 Atl. 444. GA.—*Dawson, City Council of, v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S. E. 907; *Park v. Candler*, 114 Ga. 466, 40 S. E. 523. IOWA—*Equitable Life Ins. Co. v.*

Des Moines Board of Equalization, 74 Iowa 178, 37 N. W. 141. MINN.—*Daniels v. Palmer*, 41 Minn. 116, 42 N. W. 855. N. J.—*New Jersey Ins. Co. v. Meeker*, 37 N. J. L. (8 Vr.) 282, 300. N. Y.—*Newell v. People ex rel. Phelps*, 7 N. Y. 9, 124; *Warner v. Warner*, 18 Abb. N. C. 151, 155; *Rodman v. Munson*, 13 Barb. 188, affirming 13 Barb. 63; *Lewis v. New York Cent. R. Co.*, 49 Barb. 330, 336. N. C.—*State v. Georgia Co.*, 112 N. C. 34, 19 L. R. A. 485, 17 S. E. 10. R. I.—*Brouillard, In re*, 20 R. I. 617, 40 Atl. 762. UTAH—*Harris v. Larsen*, 24 Utah 139, 66 Pac. 782.

² ALA.—*Allen v. Dickinson*, 1

applicable to a sum of money which has been promised at a future day, as to a sum now due and payable. But a sum

Minor 119, 120. CAL.—Perry v. Washburn, 20 Cal. 350; Melvin v. State, 121 Cal. 16, 24, 25, 34 L. R. A. 636, 53 Pac. 416; Chalmers v. Sheehy, 132 Cal. 459, 84 Am. St. Rep. 82, 64 Pac. 709. GA.—Epping v. Columbus, City of, 117 Ga. 263, 43 S. E. 803. ILL.—Little v. Dryer, 138 Ill. 272, 32 Am. St. Rep. 140, 27 N. E. 905. IND.—Campbell v. Indianapolis, City of, 155 Ind. 186, 57 N. E. 920. IOWA—Scott v. Davenport, City of, 34 Iowa 208, 213. ME.—Penobscot Lumbering Assoc., In re, 93 Me. 391, 45 Atl. 290. MD.—Tax Court of Baltimore City, Appeal of, v. Rice, 50 Md. 302, 316; Johnson v. Hines, 61 Md. 122, 136. MICH.—Lambie's Estate, In re, 94 Mich. 489, 54 N. W. 173. N. Y.—Latimer v. Veader, 20 App. Div. 418, 46 N. Y. Supp. 823. PA.—Baum v. Tonkin, 110 Pa. St. 569, 1 Atl. 535. TEX.—Barber v. East Dallas, City of, 83 Tex. 147, 18 S. W. 438. UTAH—Anthony v. Savage, 3 Utah 277, 3 Pac. 546.

Any sort of an obligation to pay money.—Chalmers v. Sheehy, 132 Cal. 459, 84 Am. St. Rep. 82, 64 Pac. 709; Lambie's Estate, In re, 94 Mich. 489, 54 N. W. 173; Latimer v. Veader, 20 App. Div. (N. Y.) 418, 46 N. Y. Supp. 823.

Annual payment on sewer-farm contract to be made in the future is not a present debt for the aggregate amount of the installments.

—McBean v. Fresno, City of, 112 Cal. 159, 168, 53 Am. St. Rep. 191, 197, 31 L. R. A. 794, 44 Pac. 358.

See Valparaiso, City of, v. Gardner, 97 Ind. 1, 7, 49 Am. Rep. 416, 420.

A contract for a period at a stipulated annual sum, payable quarterly, is measured by the aggregate quarterly payments for the first year, in determining municipal indebtedness.—Allison v. Chester, City of, 69 W. Va. 533, 539, 37 L. R. A. (N. S.) 142, 72 S. E. 472.

But contract by city for water for a term of thirty years, at a stipulated annual rental, creates a debt against the city for the full amount of the annual payments for the full term.—Niles Water-Works v. Niles, City of, 59 Mich. 311, 26 N. W. 525 (Sherwood, J., dissenting, p. 322).

No liability or "debt" on the annual payment, where nothing is due, in determining debt limit of municipality.—Herman v. Oconto, City of, 110 Wis. 660, 673, 86 N. W. 681.

—Semi-annual payments on water-works purchased, to be paid out of the revenue derived from the operation thereof, does not constitute a municipal indebtedness, within the meaning of the statute limiting municipal indebtedness.—State ex rel. Smith v. Neosho, City of, 203 Mo. 40, 83, 101 S. W. 99.

Appropriation of revenues of state in advance of their receipt, by the legislature, does not constitute a "debt" within the constitutional prohibition.—Stein v. Morrison, 9 Idaho 426, 449, 75 Pac. 246.

Assessment for street improvement levied against abutting property, and payment made by delivery of certificate, does not consti-

of money payable on a contingency does not become a debt till the contingency has happened.³ Thus, the wages of a seaman is not a debt till the vessel has arrived.⁴ So of a contract between shippers and owners, which does not become a debt till the termination of the voyage.⁵ So of a

tute a municipal indebtedness.—*Corey v. Ft. Dodge, City of*, 133 Iowa 666, 670, 111 N. W. 6.

Authorizing bonds to be issued by the water commissioners for the improvement of the water system does not constitute a municipal indebtedness.—*Brockenbrough v. Charlotte, City of, Water Commrs.*, 134 N. C. 1, 13, 46 S. E. 28.

Contract for construction of water-works, obligation not a "debt" within constitutional provision limiting indebtedness of a municipality.—*Swanson v. Ottumwa, City of*, 118 Iowa 161, 171, 59 L. R. A. 620, 91 N. W. 1048.

Damages arising from tort not included in the word "debt."—*Berson v. Ewing*, 84 Cal. 89, 23 Pac. 1112.

Dishonored check is not a "debt" in the usual sense.—*American Exch. Nat. Bank v. Superior Court*, 29 Cal. App. 8, 154 Pac. 279.

Levy of assessments for the purpose of constructing sewers, does not create a municipal indebtedness within the constitutional prohibition.—*McGilvery v. Lewiston, City of*, 13 Idaho 338, 348, 90 Pac. 348.

Levy of special tax for an installment, does not create a municipal indebtedness, within the constitutional limitation.—*Grunewald v. Cedar Rapids, City of*, 118 Iowa 222, 227, 91 N. W. 1059.

³ CAL.—*People v. Arguillo*, 37 Cal. 524; *McBean v. Fresno, City*

of, 112 Cal. 159, 168, 53 Am. St. Rep. 191, 197, 31 L. R. A. 794, 44 Pac. 358; *Johnson v. Bank of Lake*, 125 Cal. 6, 8, 73 Am. St. Rep. 17, 57 Pac. 664. IDAHO—*Stein v. Morrison*, 9 Idaho 426, 449, 75 Pac. 246; *McGilvery v. Lewiston, City of*, 13 Idaho 338, 348, 90 Pac. 348. IOWA—*Swanson v. Ottumwa, City of*, 118 Iowa 161, 171, 59 L. R. A. 620, 91 N. W. 1048. MO.—*State ex rel. Smith v. Neosho, City of*, 203 Mo. 40, 83, 101 S. W. 99. N. C.—*Brockenbrough v. Charlotte, City of, Water Commrs.*, 134 N. C. 1, 13, 46 S. E. 28. FED.—*Ellis, In re*, 74 C. C. A. 297, 143 Fed. 103.

Attorney's fees for services where employed to defend a corporation, does not become a debt or liability until the services are rendered.—*Johnson v. Bank of Lake*, 125 Cal. 6, 8, 73 Am. St. Rep. 17, 57 Pac. 664.

Merchandise to be delivered in installments in the future, creates no debt under the agreement until the first delivery is made.—*Wing v. Slater*, 19 R. I. 597, 601, 33 L. R. A. 566, 35 Atl. 302.

Subcontractor not to be paid until contractor paid, until the contractor is paid, has no "debt" or claim against him which is provable in bankruptcy.—*Ellis, In re*, 74 C. C. A. 297, 143 Fed. 103.

⁴ *Wentworth v. Whittemore*, 1 Mass. 471.

⁵ *Davis v. Ham*, 3 Mass. 33; *Frothingham v. Haley*, 3 Mass. 68.

covenant to pay rent quarterly, from which the tenant is liable to be discharged by quitting the premises, or by assigning the term, with lessor's consent, or the lessee may be evicted therefrom by title paramount.⁶ But a debt payable in any event, though not yet due, is a debt *debitum in præsentī, solvendum in futuro*⁷—a debt at present to be paid in future; a term applied to obligations absolute or perfect when contracted, though not payable before a certain future day, e. g., bonds, notes, and the like.⁸ Thus, the right of the federal government to duties on imported goods accrues, in the fiscal sense of the term, on the arrival of the goods at the port of entry; yet it is but a *debitum in præsentī, solvendum in futuro*, according to the requirements of the revenue law, and if a deposit of the goods is made, or a bond given, by the importer for the duties to be paid, according to the provisions of the federal statute regulating, the importer is entitled to the full credit allowed by such act.⁹ Rent, on the other hand, before the day of payment, is not *debitum in præsentī, solvendum in futuro*, but is a contingent claim liable to be wholly defeated by many intervening acts and events.¹⁰ In other words, a sum payable upon a contingency is not a "debt"; it does not become a debt until the contingency happens.¹¹

§ 841. — NATURE OF AND WHEN LIES. The action of debt is founded upon contract; the action of *assumpsit*, upon the promise.¹ An action of debt founded on a statute is considered as an action founded on a specialty, but it is not of equal dignity with a debt due by bond.²

⁶ Wood v. Partridge, 11 Mass. 488.

¹⁰ Wood v. Partridge, 11 Mass. 488, 493.

⁷ People v. Arguello, 37 Cal. 524.

¹¹ See authorities in footnote 3, this section.

⁸ Co. Litt. 292b; Goss v. Nelson,

¹ Burr. 226, 228, 97 Eng. Repr. 286, 287.

¹ Metcalf v. Robinson, 2 McL. 363, Fed. Cas. No. 9497.

⁹ Harris v. Nixon, 34 U. S. (9 Pet.) 483, 494, 9 L. Ed. 201, 205.

² United States v. Lyman, 1 Mass. 482, Fed. Cas. No. 15,647.

¹ Code Pl. and Pr.—76

The action of debt lies to recover a certain specific sum of money, or a sum that can readily be reduced to a certainty.³ It is a species of contract whereby a right to a certain sum of money is mutually acquired and lost;⁴ or, more properly, the result of such contract.⁵ The action of debt will lie in general where the sum is certain, and it is the duty of the defendant to pay the amount to the plaintiff.⁶ But it may also be brought for a sum capable of being certainly ascertained, though not ascertained at the time the action is brought.⁷

§ 842. — INDEBITATUS ASSUMPSIT OR COMMON COUNTS. Counts in indebitatus assumpsit, or common counts,¹ may be stated separately, or may be all united in the same complaint. It is only necessary to aver an indebtedness, and that said indebtedness has not been paid. Indebitatus assumpsit lies to recover the stipulated price due on a contract not under seal, where the contract has been completely performed.² The action of debt lies upon a judgment,³ or on a decree.⁴ An indorsee of a note can

³ *Baum v. Tonkin*, 110 Pa. St. 569, 1 Atl. 535.

See, also, 3 Bl. Com. 154; *Browne on Actions*, 333; *Smith on Contracts*, 497; 2 Steph. Com. 461.

⁴ 2 Bl. Com. 464.

⁵ 2 Steph. Com. 187.

⁶ *Home v. Semple*, 3 McL. 150, Fed. Cas. No. 6658; *Bank of Circleville v. Iglehart*, 6 McL. 568, Fed. Cas. No. 860.

⁷ *United States v. Colt*, Pet. C. C. 145, Fed. Cas. No. 14,839.

¹ Common counts are fully discussed, and shown that they have no place in procedural pleading, except by unwarranted judicial construction, ante, §§ 26-28. See, post, § 848.

As to use of form of assumpsit and common counts, see, also, post, § 848.

² *Bank of Columbia v. Patterson*, 11 U. S. (7 Cr.) 299, 3 L. Ed. 351; *Chesapeake & Ohio Canal Co. v. Knapp*, 34 U. S. (9 Pet.) 541, 9 L. Ed. 222; *Hyde v. Liverse*, 1 Cr. C. C. 408, Fed. Cas. No. 6972; *Brockett v. Hammond*, 2 Cr. C. C. 56, Fed. Cas. No. 1916; *Pipsico v. Bontz*, 3 Cr. C. C. 425, Fed. Cas. No. 11,183.

Compare: *Krause v. Deblols*, 1 Cr. C. C. 138, Fed. Cas. No. 7937; *Talbot v. Selby*, 1 Cr. C. C. 181, Fed. Cas. No. 13,729.

³ See *Prader, Ex parte*, 6 Cal. 239; *Stuart v. Lander*, 16 Cal. 372, 76 Am. Dec. 583; *Lawrence v. Martin*, 22 Cal. 173; *Pennington v. Gibson*, 57 U. S. (16 How.) 65, 14 L. Ed. 847.

⁴ *Thompson v. Jameson*, 5 U. S. (1 Cr.) 282, 2 L. Ed. 109; *Penning-*

have debt against the maker,⁵ or against a remote indorser.⁶ The action of debt lies on a penalty, whether it be a statutory penalty,—although uncertain,⁷ if the duty or penalty be capable of being reduced to a certainty,⁸—or for the penalty of an agreement.⁹ And in the latter case, a sum less than the penalty may be recovered.¹⁰ Such action lies to recover rent on an expired lease.¹¹ And so where there is a demise not under seal, whether against lessee or lessee's assignee, debt for use and occupation will lie.¹² The action of covenant lies where a party claims damages for a breach of covenant, that is, of a promise under seal, as distinguished from actions of assumpsit, or for breach of contracts not under seal.¹³

§ 843. IN ACTION FOR BREACH OF CONTRACT—IN GENERAL. The requisites which must carefully be observed in a complaint on contracts are: (1) The existence of the contract sued upon, and its terms clearly shown upon the face of the pleading; (2) consideration for the promise must be set out; (3) performance or readiness to perform, and a tender of performance on the part of the plaintiff, must be shown; (4) the breach must be clearly apparent, and (5) special damages resulting from the breach must be specifically and clearly averred.

§ 844. — PLEADING THE CONTRACT—METHODS OF. The existence of the contract should be stated, and if it was an alternative or a conditional engagement, or qualified

ton v. Gibson, 57 U. S. (16 How.) 65, 14 L. Ed. 847.

⁵ Pierce v. Crafts, 12 Johns. (N. Y.) 90; Willmarth v. Crawford, 10 Wend. (N. Y.) 341.

⁶ Onondaga County Bank v. Bates, 3 Hill (N. Y.) 53.

⁷ United States v. Colt, Pet. C. C. 145, Fed. Cas. No. 14,839.

⁸ Bullard v. Bell, 1 Mass. 243, Fed. Cas. No. 2121.

⁹ Martin v. Taylor, 1 Wash. C. C. 1, Fed. Cas. No. 9166.

¹⁰ Id.

¹¹ Norton v. Vultee, 1 N. Y. Super. Ct. Rep. (1 Hall) 384; Thursby v. Plant, 1 Wms. Saund. 230, 233, 85 Eng. Repr. 254.

¹² McKeon v. Whitney, 3 Den. (N. Y.) 452.

¹³ Stephen on Pleading (Williston's Ed.), p. 18. See Woolley v. Newcombe, 87 N. Y. 605.

by exceptions, this should appear in the complaint.¹ If the contract be in writing, it may be pleaded in *hæc verba*, or the pleader may set forth its legal effect. The former mode, however, is preferable as being more consistent with the present system of pleading.² But it is thought that the rule which permits the pleader to declare upon a contract in *hæc verba* must be limited to cases where the instrument set out contains the formal contract, showing in express terms the promises and undertakings on both sides.³ Where a contract is ambiguous and is pleaded in *hæc verba*, the pleader should put a construction upon it.⁴ In an action for the breach of a contract, a part only of which has been reduced to writing, the plaintiff should allege the execution of a parol agreement.⁵ A complaint setting out a contract, alleging full performance of the conditions of the same on the part of the plaintiff, and breaches thereof by the defendant, states a cause of action for nominal damages at least, and is, therefore, good on general demurrer.⁶

Better practice to plead a contract, if it be a written contract, by setting forth a copy of it or by annexing a copy to the complaint,⁷ the same as in actions upon writ-

¹ *Barilari v. Ferrea*, 59 Cal. 1; *Hatch v. Adams*, 8 Cow. (N. Y.) 35; *Stone v. Knowlton*, 3 Wend. (N. Y.) 374; *Crane v. Maynard*, 12 Wend. (N. Y.) 408; *Lutweller v. Linnell*, 12 Barb. (N. Y.) 512.

² *Stoddard v. Treadwell*, 26 Cal. 300; *Love v. Sierra Nevada Lake & Water Co.*, 32 Cal. 689, 91 Am. Dec. 602; *Joseph v. Holt*, 37 Cal. 250; *Murdock v. Brooks*, 38 Cal. 603; *White v. Soto*, 82 Cal. 654, 23 Pac. 210; *Santa Rosa Bank v. Paxton*, 149 Cal. 198, 86 Pac. 194; *Hill v. McCoy*, 1 Cal. App. 161, 81 Pac. 1016.

³ *Joseph v. Holt*, 37 Cal. 250, 253.

⁴ *Linton v. Brownsville Land & Irr. Co.*, 46 Tex. Civ. App. 225, 228, 102 S. W. 433, 435.

See, also, post, § 845, footnote 4.

⁵ *Louisville, N. A. & C. R. Co. v. Reynolds*, 118 Ind. 170, 20 N. E. 703; *American Bridge & Contract Co. v. Bullen Bridge Co.*, 29 Ore. 549, 46 Pac. 138.

⁶ *Jacobs Sultan Co. v. Union Mercantile Co.*, 17 Mont. 61, 42 Pac. 109; *Hudson v. Archer*, 4 S. D. 128, 55 N. W. 1099; *Fairbanks v. Bloomfield*, 9 N. Y. Super. Ct. Rep. (2 Duer) 439.

⁷ See *Quirk v. Clark*, 7 Mont. 231, 14 Pac. 669.

ten instruments for the payment of money only.⁸ And when so set out in the complaint, and made a part thereof, it will authorize the plaintiff to recover whatever is authorized by the terms thereof and the facts proved on the trial; the fact that the complaint construes and treats the contract improperly will not affect the plaintiff's right to recover under the terms of the contract,—e. g., contract of real estate agents construed and treated as a power of sale, when it was not such, does not defeat plaintiffs' rights to recover as mere brokers.⁹ When the writing is set forth in *hæc verba* in the complaint, such writing controls any allegation purporting to state the effect of the contract as a legal conclusion.¹⁰ If declared on according to its legal effect, the defendant may, by the rule of the common law in a proper case, *crave oyer* of the instrument; and if it appears that its provisions have been misstated, he may set out the contract in *hæc verba*, and demur on the ground of the variance.¹¹

§ 845. ——— ACCORDING TO LEGAL EFFECT. It is not necessary that the words of a deed or other written instrument should be given; the substance is sufficient.¹ But whatever is pleaded should be truly pleaded.² For where a pleading purports to recite a deed or record in *hæc verba*, trifling variances, if material, have been deemed fatal.³ The instrument set forth must be free from defect or ambiguity. If not the pleader must put some construction upon it by averment.⁴ But the mean-

⁸ See *Fiske v. Soule*, 87 Cal. 313, 25 Pac. 430.

⁹ *Id.*; see *Dolan v. Scanlan*, 57 Cal. 261.

¹⁰ *Patrick v. Colorado Smelting Co.*, 20 Colo. 268, 38 Pac. 236.

Loutsenhizer v. Farmers & Merchants' Milling Co., 5 Colo. App. 479, 39 Pac. 66.

¹¹ *Stoddard v. Treadwell*, 26 Cal. 300.—See *Los Angeles, City of, v. Signoret*, 50 Cal. 298.

¹ Pleading according to legal effect has already been fully discussed.—See, ante, § 716.

² *Ferguson v. Harwood*, 11 U. S. (7 Cr.) 408, 3 L. Ed. 386.

³ *Id.*

⁴ *Durkee v. Kota*, 74 Cal. 313, 315, 16 Pac. 5.

See, also, ante, § 844, footnote 4.

ing of words or abbreviations used in the instrument may be proved on the trial, for the purpose of enabling the court to interpret the words, and the oral evidence as to their meaning need not be stated in the pleading, nor do abbreviations contained in the contract render the pleading liable to special demurrer.⁵ Preliminary and collateral matters of substance must be alleged, and recitals in the instrument can not serve as such allegations.⁶

Records and papers can not be made a part of a pleading by merely referring to them, and praying that they may be taken as a part of such pleading, without annexing the originals or copies as exhibits, or incorporating them, so far as to form a part of the record in the cause.⁷ The party, by pleading a record with the words, "as appears by the record," or "as appears of record," proffers that issue, and it is incumbent on him to maintain it literally; and this is true where the averment has reference to particulars which need not, as well as to those which must, be specifically stated upon the record.⁸ In an action of foreclosure, where the complaint has a copy of the mortgage annexed, and to which it refers, a correct description of the land in the mortgage is sufficient for the purpose of the suit.⁹

§ 846. ——— ALLEGING CONTRACT IN WRITING. An allegation in the complaint that the defendant "made his contract in writing," imports a delivery,¹ and this need

⁵ Callahan v. Stanley, 57 Cal. 476; Berry v. Kowalsky, 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202; Jaqua v. Witham & A. Co., 106 Ind. 545; 7 N. E. 314.

⁶ Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327; Leadville Water Co. v. Leadville, City of, 22 Colo. 297, 45 Pac. 362.

⁷ People v. De la Guerra, 24 Cal. 73, 78.

⁸ Whitaker v. Branson, 2 Palne 209, Fed. Cas. No. 17,526; Purcell

v. Macnamara, 9 East 157, 160, 9 Rev. Rep. 578, 103 Eng. Repr. 533.

⁹ Emeric v. Tams, 6 Cal. 155; Whitby v. Rowell, 82 Cal. 635, 636, 23 Pac. 40, 382; Johnson v. McDuffee, 83 Cal. 30, 31, 23 Pac. 214; Hackfeld v. Mousarrat, 18 Hawaii 334. See: Ward v. Clay, 82 Cal. 502, 505, 23 Pac. 50, 227; Stephens v. American Fire Ins. Co., 14 Utah 265, 267, 47 Pac. 83.

¹ Prindle v. Carruthers, 15 N. Y. 425, 12 N. Y. Super. Ct. Rep. (5

not ordinarily be alleged,² nor need it be alleged that it was accepted.³ Exceptions, however, exist to this rule, as in case of instruments in trust, for benefit of others, where delivery should be alleged. Thus in case where a grantor handed a deed purporting to convey land to his son to a third party, saying: "Here is a writing in [my son's] favor.⁴ It is for him, but I don't want him to have it in his hands just now; I want you to take it and keep it in your possession till a proper time to produce it. If I keep it in my hands I don't know who will get hold of it," and gave his reasons, there being no privity between the depository and the grantee; on the death of the grantor, it was held that there had been no delivery.⁵

§ 847. ——— ALLEGATIONS AS TO TIME. In those cases in which time is stated in a complaint, it should be when the debt became due, though time is only material when it is sought to recover interest.¹ Thus, in an action on the case for failure to perform a parol contract, the time of making it is not material.² The plaintiff may, in fact, allege any time after the debt accrued and give evidence of the true time.³ When time is important, it should be alleged with reasonable certainty.⁴

If the time of performance is not stated, the law imports a reasonable time therefor.⁵ In assumpsit on a

Duer) 670, note, reversing 10 How. Pr. 33.

See, also, ante, § 755.

² *Tompkins v. Corwin*, 9 Cow. 255; *Brinkerhoff v. Lawrence*, 2 Sandf. Ch. (N. Y.) 400; *Peets v. Bratt*, 6 Barb. (N. Y.) 660.

³ *Gazley v. Price*, 16 Johns. (N. Y.) 267.

⁴ *Whitlock v. Fiske*, 3 Edw. Ch. (N. Y.) 131.

⁵ *Baker v. Haskell*, 47 N. H. 479, 93 Am. Dec. 455.

¹ See: *Norris v. Elliott*, 39 Cal.

71; *Todd v. Myres*, 40 Cal. 355;

Lyon v. Clark, 8 N. Y. 148, Sheld. Notes 73, affirming 1 E. D. Smith 250.

² *Scull v. Higgins*, 1 Hempst. 90, Fed. Cas. No. 12570a.

Compare: *McLaughlin v. Turner*, 1 Cr. C. C. 476, Fed. Cas. No. 8875.

³ *Wetmore v. San Francisco, City of*, 4 Cal. 299; *Farron v. Sherwood*, 17 N. Y. 227; *Moffet v. Sackett*, 18 N. Y. 522.

⁴ *Reiner v. Jones*, 3 Misc. (N. Y.) 146, 23 N. Y. Supp. 185.

⁵ *Roberts v. Mazeppa Mill Co.*,

promise to pay a debt due by the promisor, if the plaintiff would give time, whenever the promisor should be able, the declaration need not state that the plaintiff accepted the promise. It is sufficient to aver that the time was given and the ability of the defendant.⁶

§ 848. — FORM OF ACTION—ASSUMPSIT AND COMMON COUNTS. We have already seen that the forms of actions having been abolished, the common counts do not properly have any place in pleadings under the procedural codes, and that the court construction allowing the continuance of their use is unwarranted by any code rule, or other known rule, of construction and interpretation,—is judicial legislation, pure and simple.¹ But it is also true that, although the forms of the action of assumpsit and of the pleadings therein have been abolished, yet the distinction between an express and implied assumpsit remains, and it is only on theory of an implied assumpsit, “inferred from the conduct, station, or mutual relation of the parties,” that justice can be enforced and the performance of a legal duty compelled. It is no longer necessary in such a case for the plaintiff to allege in his complaint any promise on the part of the defendant; but he must state facts which if true according to the well-settled principles of law, would have authorized him to allege, and the court to infer, a promise on the part of the defendant in a case of assumpsit.²

Pleading double statement of a cause of action so as to meet the exigencies of the proofs is not permitted under the reformed procedure, as a general rule.³ It should, however, be allowed in exceptional cases, in order to prevent a failure of justice.⁴ When the general rule is vio-

30 Minn. 413, 15 N. W. 680; Fickett v. Brice, 22 How. Pr. (N. Y.) 194.

⁶ Lonsdale v. Brown, 4 Wash. C. C. 148, Fed. Cas. No. 8494.

Compare: Rice v. Barry, 2 Cr. C. C. 447, Fed. Cas. No. 11,751.

¹ See, ante, §§ 26-28, 842.

² Byxble v. Wood, 24 N. Y. 607; Farron v. Sherwood, 17 N. Y. 227.

³ See, ante, §§ 831-833.

⁴ Cramer v. Oppenstein, 16 Colo. 504, 27 Pac. 716; Kimball v. Lyon,

lated, the remedy is by motion before or at the trial for an order compelling the plaintiff to elect upon which count he will proceed.⁵ The motion to compel the plaintiff to elect is addressed to the sound judicial discretion of the court.⁶ The right to rely upon the common counts was settled by the earlier California decisions;⁷ and they may be used in an action of assumpsit against a municipal corporation.⁸ But while the common counts are in some cases sufficient under the Code, they are insufficient in those cases where they were insufficient under the old system of pleading.⁹ And where a complaint, framed in accordance with the common counts, clearly indicates that the same cause of action was stated in each count, findings for the plaintiff on one of the counts, without findings on the others, are sufficient to support a judgment in his favor.¹⁰ A complaint in an action by a contractor to enforce a mechanic's lien, in which the special contract between the contractor and owner of the building is stated, can be changed by amendment into an action on the contract, which may be counted on specially, or the common counts in assumpsit may be used, in accordance with the general rules applicable to such counts.¹¹ Complaint in action for breach of contract may be amended so as to claim upon a quantum meruit.¹² Under the New

¹⁹ Colo. 266, 35 Pac. 44; *Leonard v. Roberts*, 20 Colo. 88, 36 Pac. 880; *Pearson v. Milwaukee & St. P. R. Co.*, 45 Iowa 497.

⁵ *Wilson v. Smith*, 61 Cal. 209; *Spaulding v. Saltiel*, 18 Colo. 86, 31 Pac. 486; *Plummer v. Mold*, 22 Minn. 16.

⁶ *Manders v. Craft*, 3 Colo. App. 236, 32 Pac. 836; *Hawley v. Wilkinson*, 18 Minn. 525; *Harvey v. Southern Pac. Co.*, 46 Ore. 505, 511, 80 Pac. 1061.

⁷ See: *Ball v. Fulton County*, 31 Ark. 379; *De Witt v. Porter*, 13 Cal. 171; *Buckingham v. Waters*,

14 Cal. 146; *Farwell v. Murray*, 104 Cal. 464, 38 Pac. 199; *Pleasant v. Samuels*, 114 Cal. 34, 45 Pac. 998; *Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542.

⁸ *Brown v. Pomona, City of, Board of Education*, 103 Cal. 531, 37 Pac. 503.

⁹ *Barrere v. Somps*, 113 Cal. 97, 45 Pac. 177.

¹⁰ *Leeke v. Hancock*, 76 Cal. 127, 17 Pac. 937.

¹¹ *Castagnino v. Balletta*, 82 Cal. 250, 23 Pac. 127.

¹² See *Cox v. McLaughlin*, 76

Mexico statutes,¹³ providing that contracts which, by the common law, are joint only, shall be construed to be joint and several, and that suit may be brought and prosecuted against any one or more of the parties liable thereon, it is not essential to a recovery in assumpsit, on a contract laid in the declaration as joint, to prove a contract by all the defendants. Proof of a several contract with one is sufficient to warrant a recovery as against him.¹⁴ A contractor is not bound as a matter of pleading to declare upon the contract, but may declare for work and materials, and prove the contract.¹⁵

§ 849. — ALLEGATIONS AS TO PROMISE. In those cases in which there is an express promise, it should be properly alleged and proved. In such case, the promise is the fact constituting the cause of action. But if the promise is implied from the other facts alleged, it need not be averred. And in the absence of an express promise, every fact essential to fix the liability of the defendant should be stated; for where the plaintiff does not allege in his pleadings a contract or agreement, he can not recover upon it.¹ An implied promise is a mere conclusion of law, and the facts from which such promise is implied must be stated. But the rule is different in the case of an express promise, which is an ultimate fact, and must be pleaded as such, though the word “express” is not necessary to be used in pleading the promise. When a promise is alleged in a pleading, it must be held to be express.² In an action to enforce a promise alleged to have been made by the defendant, on a certain day, the plaintiff is entitled to recover upon proof that the promise was made at any

Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100.

¹³ New Mexico Compiled Laws, §§ 1845, 1846 and 1849.

¹⁴ Krichner v. Laughlin, 4 N. M. 218, 17 Pac. 132.

¹⁵ Hartley v. Murtha, 5 App. Div. (N. Y.) 408, 39 N. Y. Supp. 312.

¹ Wilkins v. Stidger, 22 Cal. 235, 83 Am. Dec. 64; Wills v. Wills, 34 Ind. 106; Farron v. Sherwood, 17 N. Y. 227; Jordan & S. Plank Road Co. v. Morley, 23 N. Y. 552; Irwin v. Shultz, 46 Pa. St. 74.

² Poly, Hellborn & Co. v. Williams, 101 Cal. 648, 36 Pac. 102.

time before the commencement of the action. He need not prove that it was made on or about the time alleged in the complaint.³

*A party who has wholly performed a special contract on his part may count upon the implied agreement of the other party to pay the stipulated price, and is not bound to specially declare upon the agreement.*⁴

Contract required to be in writing under the statute of frauds,—e. g., a contract relating to lands—it is not necessary to allege the facts relied on to take the case out of the statute. It is sufficient on demurrer to allege that a contract was made. Such an allegation is to be understood as intending a real contract—something which the law would recognize as such. There is no reason for departing, under the Code, from the former well-settled rules in law and equity.⁵ The existence of a writing in such case is a matter of evidence; it is not one of the pleadable facts.⁶ Thus, a complaint upon an undertaking to answer for the debt of a third person is good, though it does not allege that either the promise or the consideration was in writing.⁷ And the same rule is

³ *Biven v. Bostwick*, 70 Cal. 639, 11 Pac. 790.

⁴ *Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542; *Moffet v. Sockett*, 18 N. Y. 522; *Keteltas v. Myers*, 19 N. Y. 231; *Hasley v. Black*, 28 N. Y. 428, 26 How. Pr. 97; *Steeple v. Newton*, 7 Ore. 110, 33 Am. Rep. 705; *Tribou v. Strowbridge*, 7 Ore. 156; *Todd v. Huntington*, 13 Ore. 2, 4 Pac. 295.

Contract without consideration, entered into through mistake of both parties, imposing great hardship and injustice upon one of the parties, will ordinarily be relieved against.—*Allen v. Hammond*, 36 U. S. (11 Pet.) 63, 9 L. Ed. 636, affirming 2 Sumn. 387, Fed. Cas. No. 6000.

See, also, cases collected, 3 *Rose's Notes on U. S. Reps.*, 2d Ed., p. 193.

⁵ *Curtiss v. Aetna Life Ins. Co.*, 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211; *Etting v. Vanderlyn*, 4 Johns. (N. Y.) 237; *Meyers v. Morse*, 15 Johns. (N. Y.) 425.

⁶ *Livingston v. Smith*, 14 How. Pr. (N. Y.) 490.

⁷ *Wakefield v. Greenhood*, 29 Cal. 597; *Indiana, State of, v. Woram*, 6 Hill (N. Y.) 33, 40 Am. Dec. 378.

Required to be in writing by statute of frauds, complaint need not allege that the contract was in writing.—*Wakefield v. Greenhood*, 29 Cal. 597.

established in California.⁸ An allegation that a contract was made without stating whether or not it was in writing, will be construed to mean that the contract was in writing, if the law requires it to be so.⁹

§ 850. — ALLEGATION AS TO CONSIDERATION. The essential element of every contract being the consideration, a proper statement in the complaint becomes a matter of great importance, while an averment of consideration in cases where it is implied by law, becomes surplusage, and should be avoided. The rule, however, is that the consideration must appear on the face of the complaint, either impliedly, as in cases of sealed instruments, where the seal imports consideration;¹ or the particular consideration on which the contract is founded must be expressly stated,² whenever proof of it is necessary to support the action,³ for in its absence no cause of action can be maintained.⁴

To constitute a valuable consideration it is not necessary that money should be paid. It is sufficient that it has been expended on the faith of the contract.⁵ The acknowledgment of one dollar is sufficient, whether actually paid or not.⁶ The consideration of a written instrument may be inquired into.⁷ It has been held that

⁸ McDonald v. Mission View Homestead Assoc., 51 Cal. 210; Nuez v. Morgan, 77 Cal. 427, 19 Pac. 753; McMenomy v. Talbot, 84 Cal. 279, 23 Pac. 1099.

⁹ Barnard v. Lloyd, 85 Cal. 131, 24 Pac. 658.

¹ As to allegations on sealed agreement, see, post, § 852.

² 1 Chitty on Pleading (16th Am. Ed.), p. 293. See, also: Kean v. Mitchel, 13 Mich. 207; Douglass v. Davie, 2 McC. 218.

³ Bailey v. Freeman, 4 Johns. (N. Y.) 280.

⁴ Bristol v. Rensselaer & S. R. Co., 9 Barb. (N. Y.) 158.

⁵ King v. Thompson, 34 U. S. (9 Pet.) 204, 9 L. Ed. 102, reversing 3 Cr. C. C. 662, Fed. Cas. No. 13,962.

⁶ Lawrence v. McCalmount, 43 U. S. (2 How.) 426, 11 L. Ed. 326; Dutchman v. Tooth, 5 Bing. N. C. 577, 35 Eng. C. L. 310.

⁷ Kerr's Cyc. Cal. Code Civ. Proc., § 1962, subd. 2; § 1963, subd. 39. See, also: Carvens v. Dewey, 13 Cal. 43; Peck v. Vandenberg, 30 Cal. 12; Ingersoll v. Truebody, 40 Cal. 603; Wilson v. Ellsworth, 25 Neb. 246, 41 N. W. 177; McCulloch v. Hoffman, 10 Hun (N. Y.) 133; affirmed, 73 N. Y. 615; Miller v. McKenzie, 95 N. C. 575.

the allegation of a "good and valuable consideration" is not sufficient on demurrer, or to sustain a judgment by default; yet it is sufficient to sustain a verdict after trial upon the issues.⁸ If part of a consideration be merely voidable, the contract may be supported by the residue, if good per se. But if any part be illegal it vitiates the whole.⁹ It is no objection that the direct consideration moves to a third person.¹⁰ Nor is it an objection that it moves from a third party to the person who seeks to enforce it.¹¹ The consideration must in all cases be legally sufficient to support the promise for the breach for which the action is brought.¹² If there is a benefit to the defendant and a loss to the plaintiff directly resulting from the promise in behalf of the plaintiff, there is a sufficient consideration to enable the latter to maintain an action.¹³ The court will not inquire into the exact proportion between the value of the consideration and that of the thing to be done for it.¹⁴

Contracts imposing a restraint on one of the parties contracting, there must not only be a consideration for the contract, but some good reason for entering into it, and it must impose no restraint upon one party which is not beneficial to the other.¹⁵

§ 851. ——— EXECUTED OR PAST CONSIDERATION—
MORAL OBLIGATION. The recital in a complaint of an executed or past consideration is not usually traversable,

⁸ Kean v. Mitchell, 13 Mich. 207.

⁹ Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370; Shaw v. Carpenter (dis. op.), 54 Vt. 155, 41 Am. Rep. 837.

¹⁰ Townsley v. Sumrall, 27 U. S. (2 Pet.) 170, 7 L. Ed. 386. But see D' Wolfe v. Rabaud, 26 U. S. (1 Pet.) 476, 7 L. Ed. 227.

¹¹ Raymond v. Pritchard, 24 Ind. 318.

¹² 1 Chitty on Pleading (16th Am. Ed.), p. 292. See Bristol v. Rensselaer & S. R. Co., 9 Barb. (N. Y.) 158.

¹³ Emerson v. Slater, 63 U. S. (22 How.) 43, 16 L. Ed. 360.

¹⁴ 1 Pars. on Cont. 362, and authorities there cited.

¹⁵ California Steam Nav. Co. v. Wright, 8 Cal. 585, 591. See Webster v. Buss, 61 N. H. 45, 47 Am. Rep. 318.

and requires little certainty, either of name, place, person, or subject-matter,¹ although it should be known to both parties at the time of making the contract that the subject-matter is liable to a contingency by which it may be destroyed. If this contingency has already happened at the time, the agreement is without consideration.²

Moral obligation, however strong it may be, to do that which he agreed to do, it is only promises founded on the performance of duties actually agreed to be done, or imposed by law, which are regarded in law as binding. A promise by a party to do what he is bound in law to do, is an insufficient but not an illegal consideration.³

§ 852. ——— AGREEMENT UNDER SEAL. In those cases in which the agreement declared on is under seal, a complaint setting out the agreement in *hæc verba* need not aver any consideration for the agreement;¹ the seal imports a consideration.² But on a simple contract the law of pleading requires the complaint to state the particular consideration for the defendant's promise declared on;³ and particularly in all cases when the performance of the consideration is a condition precedent.⁴ This rule

¹ Gebhart v. Francis, 32 Pa. St. 78.

² Allen v. Hammond, 36 U. S. (11 Pet.) 63, 9 L. Ed. 633, affirming 2 Sumn. 387, Fed. Cas. No. 6000.

³ Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370.

¹ McCarty v. Beach, 10 Cal. 461; Willis v. Kempt, 17 Cal. 98; Moore v. Waddle, 34 Cal. 145, 147; Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 576, 112 Pac. 458; Brumback v. Oldham, 1 Idaho 709, 711; Northern Kansas Town Co. v. Oswald, 18 Kan. 339.

² Id.

Seal only *prima facie* showing of consideration.—McCarty v. Beach, 10 Cal. 461.

—Fraud in consideration may be proved.—Olston v. Oregon Water Power & R. Co., 52 Ore. 343, 354, 20 L. R. A. (N. S.) 915, 96 Pac. 1098, 97 Pac. 538.

Voluntary obligation under seal may be enforced although without consideration, and is impeachable for fraud only.—Garden v. Derickson, 2 Del. Ch. 386, 95 Am. Dec. 286.

As to enforcement of bond under seal which is without consideration, see note 95 Am. Dec. 287.

³ Moore v. Waddle, 34 Cal. 145; Joseph v. Holt, 37 Cal. 250, 253.

⁴ Moore v. Waddle, 34 Cal. 145.

has its exceptions, as in cases of bills of exchange and promissory notes, where the consideration is implied.⁵

In California any written instrument is presumptive evidence of a consideration,⁶ and the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it;⁷ and similar statutes have been passed in many of the states,⁸—e. g., Indiana,⁹ Iowa,¹⁰ Kansas,¹¹ Kentucky,¹² Missouri,¹³ and perhaps elsewhere. Thus, a complaint which alleges that a corporation defendant executed a contract in writing whereby it agreed and promised to pay the plaintiff on a given date a certain sum of money, states facts from which the law presumes a consideration, and the failure specially to allege a consideration for the written contract is not ground of demurrer, though the contract is not set out in *hæc verba*.¹⁴ And it has also been said that the possession of a note given by the husband to the wife is not of itself evidence that any advantage had been obtained, and the giving of it does not indicate a trust, but the note is an ordinary contract, which implies a consideration.¹⁵

⁵ *Id.*; *Hoxie v. Cushman*, 7 N. Y. Leg. Obs. 149.

⁶ *Kerr's Cyc. Cal. Civ. Code*, § 1614; *Winters v. Rush*, 34 Cal. 136; *Williams v. Hull*, 79 Cal. 606, 21 Pac. 965; *Downing v. Le Du*, 82 Cal. 471, 23 Pac. 202; *Toomy v. Dunphy*, 86 Cal. 639, 25 Pac. 130.

⁷ *Kerr's Cyc. Cal. Civ. Code*, § 1615; *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962.

⁸ *Keesling v. Watson*, 91 Md. 578; *Capels v. Branham*, 20 Mo. 244, 248; *Lindell v. Roakes*, 60 Mo. 249, 21 Am. Rep. 395; *Clay v. Edgerton*, 19 Ohio St. 549, 2 Am. Rep. 422.

⁹ *Ind. Code Civ. Proc.*, § 273.

¹⁰ *Iowa Code*, §§ 2112, 2114.

¹¹ *Kansas Gen. Stats.* (1868), p. 183.

¹² *Kentucky Gen. Stats.* (1873), p. 249.

¹³ *Missouri, Wag. Stats.* 270, § 6.

¹⁴ *Henke v. Eureka Endowment Assoc.*, 100 Cal. 429, 432, 34 Pac. 1089.

See, also, cases in footnote 1, this section.

Want of consideration shown in complaint in *Amestoy v. Electric Rapid Transit Co.*, 95 Cal. 311, 30 Pac. 550.

¹⁵ *Dimond v. Sanders*, 103 Cal. 97, 37 Pac. 189. See: *Brison v. Brison*, 75 Cal. 525, 528, 7 Am. St. Rep. 189, 17 Pac. 689; *Jackson v. Jackson*, 94 Cal. 446, 461, 29 Pac. 957.

§ 853. — **ALLEGING PERFORMANCE—CONDITIONS PRECEDENT.** We have already fully discussed the pleading of conditions precedent to a right of action,¹ and it remains here but to add that in the pleading of performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance.² The purpose of the statute is to avoid prolixity by permitting the plaintiff to aver generally, by grouping all the conditions to be performed by himself in a general averment that he has duly performed them all.³ And it is a sufficient averment to allege that he had “fully and faithfully” performed the said contract on his part.⁴ This general allegation of performance is confined to conditions contained in contracts. If the performance of a condition precedent, not contained in a contract, is necessary to create a cause of action, the facts showing such performance must be alleged.⁵

“*Party,*” as used in a code providing that “it may be stated generally that the party duly performed all the conditions on his part,” means the person or persons by

¹ See, ante, §§ 487-495, 725.

² Kerr's Cyc. Cal. Code Civ. Proc., § 457. See: *Balsingame v. Home Ins. Co.*, 75 Cal. 633, 17 Pac. 925; *Phenix Ins. Co. v. Golden*, 121 Ind. 524, 23 N. E. 503; *Louisville Underwriters v. Durland*, 123 Ind. 544, 24 N. E. 221; *Flisk v. Henarie*, 13 Ore. 156, 9 Pac. 322.

³ *Woodbury v. Sackrider*, 2 Abb. Pr. (N. Y.) 402; *Graham v. Machado*, 13 N. Y. Super. Ct. Rep. (6 Duer) 515; *Rowland v. Phalen*, 14 N. Y. Super. Ct. Rep. (1 Bosw.) 43.

⁴ *Griffiths v. Henderson*, 49 Cal.

570; *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696; *Rowland v. Phalen*, 14 N. Y. Super. Ct. Rep. (1 Bosw.) 43.

⁵ *Dye v. Dye*, 11 Cal. 167; *People ex rel. Hastings v. Jackson*, 24 Cal. 630, 632; *Rhoda v. Alameda County*, 52 Cal. 350; *Couch v. Ingersoll*, 19 Mass. (2 Pick.) 292; *Kane v. Hood*, 30 Mass. (13 Pick.) 281; *Pomroy v. Gold*, 43 Mass. (2 Metc.) 500; *Hatch v. Peet*, 23 Barb. (N. Y.) 575, 580; *Spear v. Downing*, 34 Barb. (N. Y.) 522, 532, 12 Abb. Pr. 437, 22 How. Pr.

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whom the conditions were to be performed, and the plaintiff in the suit is not necessarily the person who is the party to the contract. Upon a liberal construction, the statute means that it may be stated generally that the person or persons by whom the conditions were to be performed have duly performed, etc.⁶

§ 854. ——— ACCORDING TO INTENT OF PARTIES. In pleading the performance of a condition precedent in a contract, such performance must be averred according to the intent of the parties. Thus, a vendor of land who sues upon an agreement of sale containing a covenant on his part that he “will make a deed for the property,” must aver and prove not merely his readiness to “deliver a deed,” but that he had a good title, free of incumbrance, which he was ready and willing to convey by a legal deed.¹ An averment of performance is always made in the declaration upon contracts containing undertakings; and that averment must be supported by proof.² In pleading title to land under an act of the legislature which prescribes conditions upon the performance of which the title may be recovered, it is necessary to aver a performance of all the acts required by the statute.³ A complaint which does not allege performance of one of the essential conditions imposed upon the plaintiff by the terms of his contract, fails to state a cause of action.⁴ And when the promise declared on is in part conditional, and the performance or happening of the condition upon which the promise is to become absolute is not averred, the com-

⁶ Rowland v. Phalen, 14 N. Y. Super. Ct. Rep. (1 Bosw.) 43.

¹ Prewcet v. Vaughn, 21 Ark. 417; Washington v. Ogdon, 66 U. S. (1 Black.) 450, sub nom. Turner v. Ogden, 17 L. Ed. 203.

² United States v. Arthur, 9 U. S. (5 Cr.) 257, 3 L. Ed. 94; Bank

1 Code Pl. and Pr.—77

of Columbia v. Hanger, 26 U. S. (1 Pet.) 455, 7 L. Ed. 219.

Compare: Savory v. Goe, 3 Wash. C. C. 140, Fed. Cas. No. 12388.

³ People ex rel. Hastings v. Jackson, 24 Cal. 630, 632.

⁴ Jones v. Perot, 19 Colo. 141, 34 Pac. 728.

plaint is not sufficient, as to such conditional part of the promise, to sustain a recovery.⁵

*In an action of covenant on a contract to deliver merchandise at any place between certain points on a river, to be designated by the party to whom the delivery was to be made, the omission of such party to designate the place did not prevent the other from making a delivery at any convenient point he might select. The declaration need not aver that a place of delivery was designated, nor that notice of a place for the delivery of the merchandise was given. An issue formed as to such notice is immaterial.*⁶

§ 855. — — — WHERE PLAINTIFF BOUND TO DO CERTAIN ACTS. In an action on a contract by which the plaintiff had bound himself to do certain acts, and to procure third parties to do certain acts, the complaint alleging performance on their part, in the following form: And the plaintiff further says, that he and those on whose behalf the agreement was made and entered into by him have fully and faithfully performed and fulfilled all and singular the covenants and agreements in the said agreement contained, on the part of the said plaintiff and those on whose behalf the said agreement was made and entered into by him, as aforesaid, was held sufficient.¹ Such general averment imports a sufficient statement of being ready to do all things necessary in the future.²

*Certain work was to be done by the defendant for the government, and certain things were to be done by the plaintiff to enable the defendant to perform his contract, the declaration must show that the precedent acts were done for the government, according to the terms of the contract.*³

⁵ Patrick v. Colorado Smelting Co., 20 Colo. 268, 38 Pac. 236.

⁶ Hartfield v. Patton, 1 Hempst. 268, Fed. Cas. No. 6158a.

¹ Rowland v. Phalen, 14 N. Y. Super. Ct. Rep. (1 Bosw.) 43.

² Bentley v. Dawes, 9 Exch. 666.

³ United States v. Beard, 5 McL. 441, Fed. Cas. No. 14,551.

Compare: Hart v. Rose, 1 Hempst. 238, Fed. Cas. No. 6154a.

§ 856. — **ALLEGING NONPERFORMANCE—EXCUSE AND WAIVER.** In those cases in which performance is impracticable, such fact may be shown under an excuse for nonperformance.¹ As from sickness or death;² or by act of law;³ or by casualty of fire.⁴ In such cases, the excuse for nonperformance must be shown.⁵ If performance has been prevented or interrupted by an act of the adverse party, or where a waiver thereof may be inferred, an averment of facts constituting the excuse is sufficient.⁶ In such cases performance need not be alleged.⁷ Where the conditions contained in the contract have been modified, or plaintiff has become excused from them, an averment of performance is not proper; the original contract and the modification or excuse should be stated,⁸ because,

¹ *Wolfe v. Howes*, 24 Barb. (N. Y.) 174, 666, affirmed, 20 N. Y. 197.

As to right to rescind or abandon contract because of other parties' default, see note 30 L. R. A. 33-73.

Recovery for services and expenses under a contract with a corporation, ended by its insolvency or dissolution, see note 69 L. R. A. 128.

² *Id.*; *Fahy v. North*, 19 Barb. (N. Y.) 341; *Mendenhall v. Davis*, 52 Wash. 169, 21 L. R. A. (N. S.) 914, 100 Pac. 336.

Death of one of parties terminating contract.—See note 21 L. R. A. (N. S.) 914-930.

³ *American Mercantile Exchange v. Blunt*, 102 Me. 128, 10 L. R. A. (N. S.) 414, 66 Atl. 212; *Jones v. Judd*, 4 N. Y. 411.

Abrogation by statute before performance.—*American Mercantile Exchange v. Blunt*, 102 Me. 128, 10 L. R. A. (N. S.) 414, 66 Atl. 212.

See, also, note 10 L. R. A. (N. S.) 415.

⁴ *Lord v. Wheeler*, 67 Mass. (1 Gray) 282.

⁵ *Newcomb v. Brackett*, 16 Mass. 166; *Baker v. Fuller*, 38 Mass. (21 Pick.) 318.

⁶ See: *Mathis v. Thomas*, 101 Ind. 119; *Burns v. Fox*, 113 Ind. 205, 14 N. E. 541; *Little v. Mercer*, 9 Mo. 216; *Rivara v. Ghio*, 3 E. D. Smith (N. Y.) 264; *Clarke v. Crandall*, 27 Barb. (N. Y.) 73; *Crist v. Armour*, 34 Barb. (N. Y.) 378.

⁷ *Holmes v. Holmes*, 9 N. Y. 525, Seld. Notes 240; *Oakley v. Morton*, 11 N. Y. 25, 33, 62 Am. Dec. 49; *Holsey v. Black*, 28 N. Y. 438, 26 How. Pr. 97.

⁸ *O'Connor v. Dingley*, 26 Cal. 11, 21; *White v. Soto*, 82 Cal. 654, 657, 658, 23 Pac. 210.

Contract as modified only set out, evidence admissible of the original contract and of the modifications.—*White v. Soto*, 82 Cal. 654, 657, 658, 23 Pac. 210.

Lanitz v. King, 93 Mo. 513, 519,

as some of the cases hold, the modification or excuse can not be shown on a complaint alleging performance.⁹ If the plaintiff, in a suit on a contract, pleads performance he must prove it, and proof of excuse for nonperformance would not enable him to recover on such a pleading,¹⁰ although there are cases to the effect where the complaint contains a general allegation of the performance of a condition, proof of waiver is admissible without alleging it;¹¹ but under a complaint setting out a contract and averring its performance by the plaintiff, evidence in excuse for nonperformance is not admissible; yet this rule becomes of little importance in view of the power of amendment given to the court by the procedural codes.¹²

§ 857. — ALLEGING CONCURRENT ACTS—IN GENERAL. In those cases in which, in an action for the breach of a contract, the performance of a concurrent act, which the contract expressly, or by implication, devolved on the plaintiff, must be averred.¹ So where a contract is

6 S. W. 263; *Evarts v. Smucker*, 19 Neb. 41, 43, 26 N. W. 596; *Oakley v. Morton*, 11 N. Y. 25, 62 Am. Dec. 49; *Bogardus v. New York Life Ins. Co.*, 101 N. Y. 328, 4 N. E. 522.

⁹ *Jerome v. Stibbins*, 14 Cal. 457; *Daley v. Russ*, 86 Cal. 114, 117, 24 Pac. 867; *Perdue v. Noffsinger*, 15 Ind. 386; *Armstrong v. Rockwood*, 53 Ind. 506; *Bogardus v. New York Life Ins. Co.*, 101 N. Y. 328, 4 N. E. 522; *Garvey v. Fowler*, 6 N. Y. Super. Ct. Rep. (4 Sandf.) 665, 10 N. Y. Leg. Obs. 16.

¹⁰ *Id.*; *McDermott v. Grimm*, 4 Colo. App. 39, 34 Pac. 909.

¹¹ *Pennsylvania Fire Ins. Co. v. Dougherty*, 102 Pa. St. 568; *West v. Norwich Union Fire Ins. Co.*, 10 Utah 442, 37 Pac. 685.

¹² *Kerr's Cyc. Cal. Code Civ.*

Proc., §§ 472, 473. See *Holsey v. Black*, 28 N. Y. 438, 26 How. Pr. 97.

Full performance required except in those cases in which a sufficient excuse for nonperformance is pleaded and shown by the proof.—*Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388.

Part performance of conditions precedent, only, no recovery can be had, for failure to perform.—*Lautry v. Parks*, 3 Cow. (N. Y.) 63; *McMillan v. Vanderlip*, 12 Johns. (N. Y.) 165, 7 Am. Dec. 299; *Reab v. Moore*, 19 Johns. (N. Y.) 337; *Sickles v. Pattison*, 14 Wend. (N. Y.) 257, 28 Am. Dec. 527; *Oakley v. Morton*, 11 N. Y. 25, 62 Am. Dec. 49.

¹ *Lester v. Jewett*, 11 N. Y. 453, reversing 12 Barb. 502; *Considerant v. Brisbane*, 13 N. Y. Super Ct.

executory, a performance, or tender of performance, or a readiness and willingness to perform, on the part of the plaintiff, must be shown in the complaint.² And in those cases where the performance on the part of the plaintiff depends upon acts previously to have been done on the part of the defendant, an averment of readiness and willingness will be sufficient.³ So where there are mutual promises, not dependent on each other, the omission to state in the declaration performance of that made by the plaintiff, is cured by the verdict.⁴

§ 858. ——— MUTUALITY AT INCEPTION OR ON CONTINGENCY. In those cases in which mutuality exists at the inception of the contract, or at the time the contingency happens, no subsequent changes can destroy the contract, if the party has performed all the conditions on his part.¹ In an executory contract for the sale of an article to be paid for on delivery, the obligation for one party to pay, and the other to deliver, are mutual and dependent; and the seller must show that he was ready and offered to deliver the goods.² But where there has been part performance, a special allegation is not necessary.³ In cases where mutuality exists in the conditions of a contract, neither party can maintain an action against the other

Rep. (6 Duer) 686, 14 How. Pr. 487.

¹ Barron v. Frink, 30 Cal. 486; Englander v. Rogers, 41 Cal. 220; Tinney v. Ashley, 32 Mass. (15 Pick.) 456, 26 Am. Dec. 620; Bronson v. Wiman, 8 N. Y. 188; Beecher v. Conradt, 13 N. Y. 110, 64 Am. Dec. 535; Van Schaick v. Winne, 16 Barb. (N. Y.) 89, 94;

² West v. Emmons, 5 Johns. (N. Y.) 179.

⁴ Corcoran v. Dougherty, 4 Cr. C. C. 205, Fed. Cas. No. 3227.

¹ Sugdon on Vend. 194; Walton v. Coulson, 1 Mich. 120, Fed. Cas. No. 17,132; Jackson v. Jackson, 1

Ves. Sr. 217, 218, 27 Eng. Repr. 992; Mortlock v. Buller, 10 Ves. 292, 315, 8 Rev. Rep. 338, 32 Eng. Repr. 857, 866; Lawrenson v. Butler, 1 Sch. & L. 19.

² Gibbons v. Scott, 15 Cal. 284; Barron v. Frink, 30 Cal. 486; Englander v. Rogers, 41 Cal. 420; Dunham v. Pettee, 4 E. D. Smith 500; Fickett v. Brice, 22 How. Pr. (N. Y.) 194; Considerant v. Brisbane, 13 N. Y. Super. Ct. Rep. (6 Duer) 686, 14 How. Pr. 487.

³ Grant v. Johnson, 5 Barb. (N. Y.) 161; Wallis v. Warren, 7 Dowl. & L. 60, 4 Ex. 364, 18 L. J. R. Exch. 449, 14 L. T. 108.

for a breach of contract, without showing performance or tender of performance on his part.⁴ But where the covenants of an agreement are independent, the plaintiff can not support his action as to them without showing performance of every affirmative covenant on his part, and in such a case it is competent to the defendant to prove a breach of such as are negative.⁵ Thus, where it was agreed that plaintiff, in consideration of the payment of a certain sum and the delivery of certain notes on a certain day, would make a certain assignment to defendant, plaintiff in an action to recover the money need not allege performance or offer of performance.⁶

§ 859. ——— NOTICE AND REQUEST. In those cases in which notice is necessary to give a right of action, such notice must be specially averred.¹ And an averment of facts "which defendant well knew" is not sufficient.² Otherwise if knowledge only is necessary to fix the liability; as for keeping mischievous animals;³ against a municipal corporation for defect in a grating over an area in a sidewalk,⁴ and other like cases. So, also, when-

⁴ See: *Englander v. Rogers*, 41 Cal. 420; *Duad v. King*, 19 Mass. (2 Pick.) 155; *Lester v. Jewett*, 11 N. Y. 453, reversing 12 Barb. 502; *Topping v. Root*, 5 Cow. (N. Y.) 404; *Porter v. Rose*, 12 Johns. (N. Y.) 209, 7 Am. Dec. 306; *Gazley v. Price*, 16 Johns. (N. Y.) 267; *Parker v. Parmele*, 20 Johns. (N. Y.) 130, 11 Am. Dec. 253; *Walden v. Davison*, 11 Wend. (N. Y.) 67, 25 Am. Dec. 602; *Culver v. Burgher*, 21 Barb. (N. Y.) 324; *Flickett v. Brice*, 22 How. Pr. (N. Y.) 194.

⁵ *Webster v. Warren*, 2 Wash. C. C. 456, Fed. Cas. No. 17,339.

⁶ *Smith v. Betts*, 16 How. Pr. (N. Y.) 251.

¹ *Bensley v. Atwill*, 12 Cal. 231;

Colt v. Root, 17 Mass. 229; *Hobart v. Hillard*, 28 Mass. (11 Pac.) 144.

As to notice generally, see, ante, § 493.

² *Colchester v. Brooke*, 7 Ad. & E. N. S. (7 Q. B.) 339, 53 Eng. C. L. 339.

³ *Fairchild v. Bently*, 30 Barb. (N. Y.) 147, 1 Am. Neg. Cas. 210; See *Thornton v. Layle*, 33 Ky. L. Rep. 382, 17 L. R. A. (N. S.) 1233, 111 S. W. 279; *Emmons v. Stevane*, 77 N. J. L. 570, 24 L. R. A. (N. S.) 458, 73 Atl. 544.

As to notice charging owner in such cases, see, note, 24 L. R. A. (N. S.) 458.

⁴ *McGinity v. New York, City of*, 12 N. Y. Super. Ct. Rep. (5 Duer) 674. See *Beale v. Seattle, City of*,

ever a request is necessary to give a party a right to sue, it must be specially averred;⁵ and where the statute prescribes conditions precedent to the acquirement of a right, the performance of those conditions must be specifically averred, and the facts showing such performance must be pleaded.⁶

In action by a purchaser to recover money paid in part execution of a contract rescinded by the vendor, an allegation of tender or readiness to pay the whole price is not necessary.⁷ So, on a contract for wheat to be delivered on demand, it was not necessary to aver a tender.⁸ And under an averment of tender, the plaintiff may prove a waiver of it by defendant.⁹

§ 860. ——— TENDER OF OR READINESS AND WILLINGNESS TO PERFORM. It has been said that a tender of performance, or a readiness and willingness to perform, is a substitute for the general allegation of performance in such cases as it may be required. It may also be alleged that the plaintiff offered to perform.¹ In England, a general averment of readiness and willingness is sufficient.²

28 Wash. 593, 92 Am. St. Rep. 892, 61 L. R. A. 583, 69 Pac. 12; Vancouver, City of, v. Cummings, 46 Can. Sup. Ct. Rep. 457, 5 N. C. C. A. 969.

⁵ Ramsey v. Waltham, 1 Mo. 395; Ferner v. Williams, 37 Barb. (N. Y.) 9, 14 Abb. Pr. 215.

⁶ People ex rel. Hastings v. Jackson, 24 Cal. 630, 632, 633; People v. Holliday, 25 Cal. 300, 303; Rhoda v. Alameda County, 52 Cal. 350, 352; Himmelman v. Danoy, 35 Cal. 441, 448; Biron v. St. Paul Board of Water Commrs., 41 Minn. 519, 520, 43 N. W. 482; McKeolin v. Northern Pac. R. Co., 45 Fed. 465.

⁷ McKnight v. Dunlap, 4 Barb.

(N. Y.) 36; affirmed, 5 N. Y. 537; Main v. King, 8 Barb. (N. Y.) 535; Fancher v. Goodman, 29 Barb. (N. Y.) 315, 316.

⁸ Crosby v. Watkins, 12 Cal. 85; Dudley v. Thomas, 23 Cal. 369.

⁹ Holmes v. Holmes, 9 N. Y. 525, 1 Seld. Notes 240.

¹ Williams v. Healey, 3 Den. (N. Y.) 363; Crandall v. Clark, 7 Barb. (N. Y.) 169; Clarke v. Crandall, 27 Barb. (N. Y.) 73.

As to tender generally, see, ante, § 494.

—As to sufficiency of averment of, see, ante, § 495.

² Rust v. Nottidge, 1 El. & B. 99, 72 Eng. C. L. 98; Bently v. Doves, 9 Welsb. H. & G. (9 Exch.) 666.

So also in Ohio.³ And such tender or offer of performance must be proved.⁴ But an offer of performance is of no effect if the person making it is not able and willing to perform according to the offer.⁵

§ 861. — ALLEGING BREACH OF CONTRACT—IN GENERAL. A complaint charging breach of contract must state a breach in unequivocal language.¹ A general allegation, however, will be sufficient to admit proof, and will only be obnoxious to a motion to render it more certain.² Thus, where the covenant describes a specific act, the breach may be averred in the language of the covenant; but if a number of acts are included in one phrase, the complaint must set forth the breach of each particular act upon which the plaintiff relies with particularity.³ For when a party relies upon any breaches of an agreement as the foundation of an action, he must set forth in his pleading sufficient of the agreement to make it appear to the court that the breaches complained of do actually exist, and to what extent.⁴ If the promise contained an exception or proviso, it must be stated.⁵ And on a contract containing various undertakings, the plaintiff complaining of the breach of one, thereby waives any right as to the others.⁶

³ Nathan v. Lewis, 1 Hand. (Ohio) 242.

⁴ Goodwin v. Lynn, 4 Wash. C. C. 714, Fed. Cas. No. 5553.

⁵ Kerr's Cyc. Cal. Civ. Code, § 1495.

¹ Moore v. Besse, 30 Cal. 570; People v. Central Pac. R. Co., 76 Cal. 29, 18 Pac. 90; Curtiss v. Bachman, 84 Cal. 216, 23 Pac. 79; Terre Haute & L. R. Co. v. Sherwood, 132 Ind. 129, 32 Am. St. Rep. 239, 17 L. R. A. 339, 31 N. E. 781; Van Schaick v. Winne, 16 Barb. (N. Y.) 89; Schenck v. Naylor, 9 N. Y. Super. Ct. Rep. (2 Duer) 675.

² Trimble v. Stilwell, 4 E. D. Smith, 512.

³ Brown v. Stebbins, 4 Hill (N. Y.) 154; Wolfe v. Luyster, 1 N. Y. Super. Ct. Rep. (1 Hall) 146.

⁴ Lynch v. Murray, 21 How. Pr. (N. Y.) 154.

⁵ Latham v. Rutley, 2 Barn. & Cr. 20, 9 Eng. C. L. 19; Jones v. Cowley, 4 Barn. & Cr. 446, 10 Eng. C. L. 653; Tempany v. Burnand, 4 Campb. 20.

⁶ Chinn v. Hamilton, Hempst. 438, Fed. Cas. No. 2685.

§ 862. ——— SUFFICIENCY OF ALLEGATION—SURPLUSAGE. In those cases where action is brought to redress a wrong committed by the breach of a contract, and the plaintiff only seeks to recover the general damages which have resulted, he states a good cause of action when he sets up the contract, states the facts which constitute the breach, and alleges generally that he has been damaged in a specified sum.¹ If the complaint sets up a contract and alleges a breach thereof, a demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action, is not well taken, since the plaintiff is entitled to nominal damages at least.² But the complaint in an action to recover damages for the breach of an alleged contract is insufficient, if it merely alleges a promise without averring its breach, or if it assigns a breach of something which is not alleged to have been promised;³ and the same is true of a complaint which misconstrues the contract sued on, and does not contain allegations entitling the plaintiff to recover.⁴ A complaint showing a good cause of action is not bad because of unnecessary averments contained in it. Such averments will not vitiate a complaint which states a good cause of action exclusive of them.⁵ Where a contract is fully expressed without abbreviations used therein, they may be disregarded as surplusage, if they are meaningless.⁶ A complaint declaring on a contract for the payment of a sum of money in installments, when realized from products of land, which alleges the contract and its terms, the sale of the land by the defendant and

¹ Pueblo, City of, v. Griffin, 10 Colo. 366, 15 Pac. 616; San Juan County School Dist. No. 1 v. Ross, 4 Colo. App. 493, 36 Pac. 560.

² See Wilson v. Clark, 20 Minn. 367; Winsor v. Barber, 10 Ore. 342; Sunnyside Land Co. v. Willamette Bridge R. Co., 20 Ore. 544, 26 Pac. 835.

³ Du Brutz v. Jessup, 70 Cal. 75, 11 Pac. 498.

⁴ McPhee v. Young, 13 Colo. 80, 21 Pac. 1014.

⁵ Byard v. Harkrider, 108 Ind. 376, 9 N. E. 294.

⁶ Berry v. Kowalsky, 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202.

products thereof received by him, and the non-payment of the money or installments due, sufficiently alleges a breach of the contract.⁷ A recital in a complaint, in an action upon a written instrument, that the defendant, "being indebted," executed it, is unnecessary, and may be rejected as surplusage.⁸ So, in a Nevada case, where an action was brought to recover damages for breach of contract, it was held that the averments in the complaint that the money expended in repairing a ditch was paid by the plaintiff "to defendant's use," and that "the defendant promised to pay the same," might be treated as surplusage, and that, without these words, the facts alleged in the complaint constituted a cause of action for damages for breach of contract.⁹ But statements of facts in a complaint, which are in themselves material and relevant to the cause of action, can not be regarded as surplusage, although they overthrow the pleading.¹⁰

Stipulations in favor of defendant inserted in a contract need not be negatived by the plaintiff in his complaint in an action for breach of the contract; to be taken advantage of, such stipulations must be pleaded by the defendant.¹¹

§ 863. — ALLEGATION OF SPECIAL DAMAGES. An action lies for the breach of a contract, although no actual damages be sustained.¹ And damages which materially and necessarily arise from the breach of the contract need not be stated, as they are covered by the general damages laid in the complaint;² but special damages must be spe-

⁷ Polrier v. Gravel, 88 Cal. 79, 25 Pac. 962; Sherlag v. Kelley, 200 Mass. 236, 128 Am. St. Rep. 414, 19 L. R. A. (N. S.) 633, 86 N. E. 294.

⁸ Polrier v. Gravel, 88 Cal. 79, 25 Pac. 962.

⁹ Orr Water Ditch Co. v. Reno Water Co., 19 Nev. 60, 6 Pac. 72.

¹⁰ Knopf v. Morel, 111 Ind. 570, 13 N. E. 51.

¹¹ Hudson v. Archer, 4 S. D. 128, 55 N. W. 1099.

¹ McCarty v. Beach, 10 Cal. 461; Hancock v. Hubbell, 71 Cal. 537, 12 Pac. 618; Jacobs Sultan Co. v. Union Mercantile Co., 17 Mont. 61, 65, 42 Pac. 109.

See, also, ante, § 862.

² Sherlag v. Kelley, 200 Mass.

cially stated.³ It is sufficient, so far as the demurrer is concerned, to aver in the complaint the contract, the breach complained of, and the general damages.⁴ But the omission to aver specially the damages laid in the complaint, is waived by going to trial without objection.⁵ In an action for special damages for injuries, such damages as are the natural although not the necessary result of the injury must be specially stated, and the facts out of which they arise must be specially averred in the complaint.⁶ Thus, a jury can not give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters.⁷ A complaint showing a breach of contract by the defendant in refusing to pay an agreed compensation to the plaintiff as attorney, who was prevented by the defendant from fully performing, and alleging that a certain sum of money and interest is due under the contract, is not insufficient in not containing a specific allegation of damages, the facts being stated which in law constitute his damages and their measure.⁸

232, 236, 128 Am. St. Rep. 414, 19 L. R. A. (N. S.) 633, 86 N. E. 293.

³ Mitchell v. Clarke, 71 Cal. 163, 60 Am. Rep. 529, 11 Pac. 882; Hancock v. Hubbell, 71 Cal. 537, 12 Pac. 618; Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242, 41 Pac. 1020; Harron, Rickard & McCone v. Wilson, Lyon & Co., 4 Cal. App. 488, 497, 500, 88 Pac. 512; Tucker v. Parks, 7 Colo. 62, 298, 1 Pac. 427, 3 Pac. 486; Pueblo, City of, v. Griffin, 10 Colo. 366, 15 Pac. 616; Ennis v. Buckeye Pub. Co., 44 Minn. 105, 46 N. W. 314; Bas v. Steele, 3 Wash. C. C. 381, Fed. Cas. No. 1088.

⁴ Barber v. Cazalls, 30 Cal. 92.

⁵ Neary v. Bostwick, 2 Hilt. (N. Y.) 514.

⁶ Cole v. Swantson, 1 Cal. 51, 52 Am. Dec. 218; Tuolumne Water Co. v. Columbia & Stanislaus Water Co., 10 Cal. 193; Stevenson v. Smith, 28 Cal. 102, 87 Am. Dec. 107; Grandona v. Loodal, 70 Cal. 161, 12 Am. St. Rep. 12, 11 Pac. 623; Smith v. Los Angeles & Pac. R. Co., 98 Cal. 210, 33 Pac. 53; Mallory v. Thomas, 98 Cal. 644, 33 Pac. 757; Strang v. Whitehead, 12 Wend. (N. Y.) 64; Squier v. Gould, 14 Wend. (N. Y.) 159.

See, also, 1 Chitty on Pleading (16th Am. Ed.), p. 371.

⁷ Dabovich v. Emeric, 12 Cal. 171.

⁸ Bartlett v. Savings Bank, 79 Cal. 218, 12 Am. St. Rep. 139, 21

Want of averment of special damages can not be reached by special demurrer.⁹ An averment of special damages is necessary only in those cases in which the right of action itself depends upon such special injury received;¹⁰ and in those cases in which the defendant had knowledge when the contract was entered into of special circumstances affecting the contract, and which would entail special injury on its breach, evidence of such circumstances is admissible to show that fact without a special averment thereof.¹¹ When the complaint contains no averment which would sustain a recovery for temporary or special damages, a question as to such damages should not be submitted to the jury.¹²

Matters in aggravation of damages, it has been held, need not be alleged; the quo animo may be proved without being pleaded,¹³ and, therefore, should not be pleaded.¹⁴ On the other hand it is held that a claim for loss of anticipated profits may be joined with a claim for actual outlay and expenditures, in an action for damages for breach of a contract of employment as general manager of a business, or as exclusive agent of a business for a particular territory for a specified time, payment to be a commission on the business actually transacted.¹⁵

Pac. 743. See *Watson v. Columbia Min. Co.*, 118 Ga. 603, 606, 45 S. E. 462; *Sessions v. Warwick*, 46 Wash. 156, 168, 89 Pac. 483.

⁹ *McCarty v. Beach*, 10 Cal. 461; *Moody v. Peirano*, 7 Cal. Unrep. 247, 84 Pac. 783; *Moody v. Peirano*, 4 Cal. App. 411, 415, 88 Pac. 380.

¹⁰ *Mitchell v. Clarke*, 71 Cal. 163, 60 Am. Rep. 529, 11 Pac. 882; *Hale Bros. v. Milliken*, 5 Cal. App. 344, 352, 90 Pac. 365.

¹¹ *McCarty v. Beach*, 10 Cal. 461.

¹² *Denver, T. & Ft. W. R. Co.*

v. Pulaski Irr. Ditch Co., 19 Colo. 367, 35 Pac. 910.

¹³ *Slack v. McChesney*, 2 Yeates (Pa.) 473; *Wallis v. Mease*, 3 Binn. (Pa.) 546; *Kean v. McLaughlan*, 2 Serg. & R. (Pa.) 469; *Rustell v. Macquister*, 1 Campb. 49.

¹⁴ *Malony v. Dows*, 15 How. Pr. (N. Y.) 265; *Warne v. Chadwell*, 2 Stark. 457, 3 Eng. C. L. 487.

Compare: *Root v. Foster*, 9 How. Pr. (N. Y.) 37; *Brewer v. Temple*, 15 How. Pr. (N. Y.) 286.

¹⁵ *Wells v. National Life Assoc.*, 39 C. C. A. 476, 99 Fed. 222, 53 L. R. A. 33. See: *ARK.—Spencer Medicine Co. v. Hall*, 78 Ark.

§ 864. IN ACTIONS FOR INJURIES RESULTING FROM NEGLIGENCE—IN GENERAL. It may be stated generally that actionable negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do. It is not absolute or intrinsic, but is always relative to some circumstances of time, place, or person.¹ The prudence and propriety of men's actions are not judged by the event, but by the circumstances under which they act. If they conduct themselves with reasonable prudence and good judgment, they are not to be made responsible because the event, from causes which could not be foreseen nor reasonably anticipated, has disappointed their expectations.² Where the safety of human life is in question, a very high degree of care is required.³ But a casualty happening without the will and

336, 343, 93 S. W. 985. ILL.—Chalstran v. Board of Education, 244 Ill. 470, 475, 91 N. E. 712. MASS.—Fox v. Harding, 63 Mass. (9 Cush.) 522. MINN.—Emerson v. Pacific Coast & Norway Packing Co., 96 Minn. 1, 6, 113 Am. St. Rep. 503, 6 Ann. Cas. 973, 1 L. R. A. (N. S.) 449, 104 N. W. 573. N. Y.—Devlan v. New York, City of, 63 N. Y. 8, 25, 50 How. Pr. 1. OKLA.—Cloe v. Rogers, 31 Okla. 255, 269, 38 L. R. A. (N. S.) 366, 377, 121 Pac. 201. ORE.—Wisner v. Barber, 10 Ore. 342. PA.—Hay v. Gronable, 34 Pa. St. 9, 75 Am. Dec. 628; Wilson v. Wernwag, 217 Pa. St. 82, 92, 10 Ann. Cas. 649, 66 Atl. 242; Singer v. Brennen, 19 Pa. Dist. Ct. Rep. 379, 37 Pa. Co. Ct. Rep. 405. TENN.—Michigan Mut. Life Ins. Co. v. Coleman, 118 Tenn. 215, 236, 100

S. W. 122. TEX.—McLane v. Maurer, 28 Tex. Civ. App. 75, 83, 66 S. W. 1108. W. VA.—McClanahan v. Caul, 63 W. Va. 418, 522, 60 S. E. 382. FED.—Portland C. v. Searle, 169 Fed. 973.

See, also, notes, 75 Am. Dec. 631; 10 Ann. Cas. 654; 53 L. R. A. 33-112; 38 L. R. A. (N. S.) 366.

¹ Richardson v. Kier, 34 Cal. 63, 91 Am. Dec. 681; Barrett v. Southern Pac. Co., 91 Cal. 296, 25 Am. St. Rep. 186, 27 Pac. 666; Tetherow v. St. Joseph & D. M. R. Co., 98 Mo. 74, 14 Am. St. Rep. 617, 18 S. W. 310; Gunn v. Ohio River R. Co., 36 W. Va. 165, 32 Am. St. Rep. 842, 14 S. E. 465.

² Amethyst, The, Davies 20, 2 Ware 28, 2 N. Y. Leg. Obs. 312, Fed. Cas. No. 330.

³ Castle v. Duryea, 32 Barb. (N. Y.) 480; affirmed, *41 N. Y. (2 Keyes) 169.

without the negligence or other default of the party, is, as to him, an inevitable casualty.⁴ Ordinary care or common prudence is such a degree of care and caution as will be in due proportion to the injury or damage to be avoided.⁵ Thus, the question of negligence must depend upon the facts of the case, and it is not an abstract question of law.⁶ Hence it will not be necessary in a complaint to aver the degrees of negligence in each case, as they are matters of proof to be decided from the facts stated.⁷ Negligence implies gross as well as ordinary negligence; and a general averment of negligence is all that is required.⁸ If an employment requires skill, failure to exert it is culpable negligence, for which an action lies;⁹ even in the case where a passenger is carried gratuitously and is injured while on the journey through negligence.¹⁰ The negligence for which a recovery is

⁴ *Hodgson v. Dexter*, 1 Cr. C. C. 109, Fed. Cas. No. 6565; *Lotty, The, Olc.* 329, Fed. Cas. No. 8524; *Forward v. Pittard*, 1 T. R. 27, 99 Eng. Repr. 953.

⁵ *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 90 Am. Dec. 761; *Baxter v. Second Ave. R. Co.*, 26 N. Y. Super. Ct. Rep. (3 Rob.) 510, 30 How. Pr. 219.

⁶ *Welling v. Judge*, 40 Barb. (N. Y.) 193.

⁷ *Nolton v. Western R. Co.*, 15 N. Y. 444, 69 Am. Dec. 623, affirming 10 How. Pr. 97; *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310.

⁸ *House v. Meyer*, 100 Cal. 592, 35 Pac. 308.

⁹ *Steamboat New World, The, v. King*, 57 U. S. (16 How.) 469, 14 L. Ed. 1019.

As to what constitutes negligence, see *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409; *Karr v. Parks*, 40 Cal. 188; *Schlier-*

hold v. North Beach & Mission R. Co., 40 Cal. 447; *McCoy v. California Pac. R. Co.*, 40 Cal. 532, 6 Am. Rep. 623.

"Gross" and "ordinary" negligence not to be determined by any rule of law, but is left for the jury to determine in each case.—*Steamboat New World, The, v. King*, 57 U. S. (16 How.) 469, 14 L. Ed. 1019.

See, also, cases collected in 4 *Rose's Notes on U. S. Reps.*, 2d ed., p. 812.

¹⁰ *Steamboat New World, The, v. King*, 57 U. S. (16 How.) 469, 14 L. Ed. 1019. See: ALA.—*Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607. GA.—*Southern R. Co. v. Decker*, 5 Ga. App. 21, 35, 62 S. E. 678, 684. FLA.—*Florida So. R. Co. v. Hirst*, 30 Fla. 1, 40, 32 Am. St. Rep. 17, 35, 16 L. R. A. 631, 639, 11 So. 506, 513. MASS.—*Dickinson v. West End R. Co.*, 177 Mass. 365, 367, 59 N. E.

sought must be alleged in the complaint.¹¹ And it is held in some jurisdictions that the plaintiff must state the facts constituting his cause of action. He must allege in his complaint the acts or omissions of the defendant upon which he bases his right to recovery, and show that the injury occurred through or by the negligence of the defendant. A general allegation of negligence is held not to charge any fact.¹²

§ 865. — NEGLIGENCE OF PLAINTIFF PREVENTING RECOVERY. In New York, in an action for damages caused by negligence, it must appear that the plaintiff's acts or omissions did not contribute in any degree to the result.¹ The rule that, where the injury has been caused by the negligence of the party injured, he has no redress, has

60. N. C.—McNeill v. Durham & C. R. Co., 132 N. C. 510, 95 Am. St. Rep. 641, 67 L. R. A. 227, 135 N. C. 682, 47 S. E. 765. W. VA.—Harris v. City & E. G. R. Co., 69 W. Va. 65, Ann. Cas. 1912D, 59, 50 L. R. A. (N. S.) 706, 70 S. E. 859. WIS.—Gabbert v. Hackett, 135 Wis. 86, 90, 14 L. R. A. (N. S.) 1075, 115 N. W. 345. FED.—New York Central R. Co. v. Lockwood, 84 U. S. (17 Wall.) 354, 383, 21 L. Ed. 627, 641, 10 Am. Rep. 374; Panama, The City of, 101 U. S. 453, 25 L. Ed. 1061; Waterbury v. New York Cent. R. Co., 21 Blatchf. 316, 48 Am. Rep. 1, 17 Fed. 672; Farmers' Loan & Trust Co. v. Baltimore & O. R. Co. (Vette v. Harmon), 102 Fed. 17, 18; California Nav. & Imp. Co., In re., 110 Fed. 673; Whitney v. New York, N. H. & H. R. Co., 43 C. C. A. 19, 50 L. R. A. 615, 110 Fed. 854; Indianapolis Traction & Terminal Co. v. Lawson, 74 C. C. A. 630, 6

Ann. Cas. 666, 5 L. R. A. (N. S.) 721, 143 Fed. 836.

See, also, cases cited 4 Rose's Notes on U. S. Reps., 2d ed., pp. 806-809.

¹¹ Rosewarn v. Washington Gold Min. Co., 84 Cal. 219, 23 Pac. 1035.

¹² See Smith v. Buttner, 90 Cal. 95, 27 Pac. 29; Jones v. White, 90 Ind. 255; Cleveland, C. C. & I. R. Co. v. Wyant, 100 Ind. 160; Current v. Missouri Pac. R. Co., 86 Mo. 62; Woodward v. Oregon R. & Nav. Co., 18 Ore. 289, 22 Pac. 1076; McPherson v. Pacific Bridge Co., 20 Ore. 486, 26 Pac. 560.

¹ Wilds v. Hudson River R. Co., 24 N. Y. 430, 23 How. Pr. 492, reversing 33 Barb. 503; Weston v. Troy, City of, 139 N. Y. 281, 34 N. E. 780; Chisholm v. State, 141 N. Y. 246, 36 N. E. 184; Francisco v. Troy & L. R. Co., 78 Hun (N. Y.) 13, 29 N. Y. Supp. 247; Delafield v. Union Ferry Co., 23 N. Y. Super. Ct. Rep. (10 Bosw.) 216.

been commented on and qualified in California,²—and the same doctrine is held elsewhere,³—where it is held that the negligence which disables a plaintiff from recovering must be a negligence which directly or by natural consequence conduces to the injury.⁴ It must have been the proximate cause; that is, negligence at the time the injury happened.⁵ But it is not incumbent on plaintiff to allege in his complaint that he was free from fault and not guilty of contributory negligence.⁶

§ 866. — ALLEGATION AS TO PLAINTIFF BEING WITHOUT FAULT. It is not necessary to allege in the complaint in an action for damages to either person or property that the plaintiff is without fault,¹ as it may fairly be presumed that the plaintiff exercised usual care for his own safety;² although it is held otherwise in Indiana,³ and in Oklahoma.⁴ The right to recover damages for injuries to the person depends upon two concurring facts: (1)

² *Richmond v. Sacramento Val. R. Co.*, 18 Cal. 351.

³ See *Sawyer v. Sauer*, 10 Kan. 472; *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125, 135, 18 Am. Rep. 360, 367; *Mississippi Cent. R. Co. v. Mason*, 51 Miss. 234, 244; *Buck v. People's St. R. & Elec. L. & P. Co.*, 46 Mo. App. 555, 566; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 278, 38 L. Ed. 398, 441, 14 Sup. Ct. Rep. 619.

⁴ *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409; *Williams v. Southern Pac. R. Co.*, 2 Cal. Unrep. 712, 11 Pac. 849; *Esrey v. Southern Pac. Co.*, 88 Cal. 399, 406, 26 Pac. 211, 213.

⁵ *Kline v. Central Pac. R. Co.*, 37 Cal. 400, 99 Am. Dec. 282; *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409; *Flynn v. San Francisco & S. J. R. Co.*, 40 Cal. 14, 6 Am. Rep. 505; *Maumus v.*

Champion, 40 Cal. 121; *Hearne v. Southern Pac. R. Co.*, 50 Cal. 482.

⁶ *Robinson v. Western Pac. R. Co.*, 48 Cal. 409; *House v. Meyer*, 100 Cal. 592, 35 Pac. 308.

¹ *Durgin v. Neal*, 82 Cal. 595, 23 Pac. 133; *Wolfe v. Richmond County Supervisors*, 11 Abb. Pr. (N. Y.) 270, 19 How. Pr. 370; *Melhado v. Poughkeepsie Transp. Co.*, 27 Hun (N. Y.) 99; *Coughtry v. Willamette St. R. Co.*, 21 Ore. 245, 27 Pac. 1031; *Johnson v. Oregon S. L. & U. N. R. Co.*, 23 Ore. 94, 31 Pac. 283; *Johnson v. Bellingham Bay Imp. Co.*, 13 Wash. 455, 43 Pac. 370.

² *Johnson v. Hudson River R. Co.*, 20 N. Y. 65, 75 Am. Dec. 375.

³ *Brannen v. Kokomo, G. & J. Gravel Road Co.*, 115 Ind. 115, 7 Am. St. Rep. 411, 17 N. E. 202.

⁴ *Guthrie, City of, v. Mix*, 3 Okla. 136, 41 Pac. 343.

The party claimed to have done the injury must be chargeable with some degree of negligence, if a natural person; if a corporation, with some degree of negligence on the part of its servants or agents; (2) The party injured must have been entirely free from any degree of negligence which contributed proximately to the injury.⁵ Where negligence consists in the omission of a duty, the facts relied on as implying that duty must be alleged.⁶ The allegation that the injury continued to be done from time to time, from the date of the wrongful act until the commencement of the suit, claiming special damages as a matter of aggravation, need not state the time or times when the damages were sustained, as the legal effect of the allegation is that they were sustained when the wrongful act was committed, and on divers days between that time and the commencement of the suit.⁷ But in California those damages only which are not the necessary result of the injury must be specially pleaded. The future and permanent effect of injuries necessarily resulting to the plaintiff from the negligence of the defendant need not be specially alleged in order to warrant a recovery therefor, but are recoverable under the general *ad damnum* clause.⁸

§ 867. ALLEGATIONS AS TO VARIOUS MATTERS. We have already sufficiently treated various matters of pleading, applicable alike to the pleadings of the plaintiff and to the pleadings of the defendant, and not being peculiar to the complaint alone; such the method of pleading an

⁵ See authorities cited in footnotes 1 and 2, this section.

⁶ *Buffalo, City of, v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550, 1 Seld. Notes 25, affirming 14 Barb. 101; *Gregory v. Oaksmith*, 12 How. Pr. (N. Y.) 134; *Congreve v. Morgan*, 11 N. Y. Super. Ct. Rep. (4 Duer) 349; *McGinity v. New York, City of*, 12 N. Y. Super. Ct. Rep. (5

¹ Code Pl. and Pr.—78

Duer) 674; *Taylor v. Atlantic Mut. Ins. Co.*, 15 N. Y. Super. Ct. Rep. (2 Bosw.) 106; *Seymour v. Maddox*, 16 Ad. & E. N. S. (16 Q. B.) 326, 71 Eng. C. L. 326.

⁷ *McConnel v. Kibbe*, 33 Ill. 175, 85 Am. Dec. 265.

⁸ *Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep. 175, 5 L. R. A. 498, 5 N. C. C. A. 26n, 22 Pac. 266.

account,¹ a judgment,² a private statute or ordinance,³ the statute of limitations,⁴ a written instrument,⁵ a foreign document or statute or a document in a foreign language,⁶ and the like. Other general principles relating to and governing the sufficiency of complaints will be found discussed in chapter one of this part.

III. DEMAND OF RELIEF.

§ 868. IN GENERAL — CALIFORNIA CODE REQUIREMENT. Under the procedural code of California,—and there is a like provision in other procedural codes and statutes,—it is required that the complaint shall contain a demand for the relief which the plaintiff claims.¹ This is the most important subdivision of the section, as the relief granted to the plaintiff, if there be no answer, shall not exceed that demanded in the complaint;² although it has been held that a judgment for an amount greater than that demanded in the prayer of the complaint is not void, but merely erroneous,³ being valid until modified or

¹ See, ante, § 723.

² See, ante, § 724.

³ See, ante, § 727.

⁴ See, ante, § 726.

⁵ See, ante, § 721.

⁶ See, ante, § 722.

¹ Kerr's Cyc. Cal. Code Civ. Proc., § 426, subd. 3.

² Kerr's Cyc. Cal. Code Civ. Proc., § 580. See *Raum v. Reynolds*, 11 Cal. 19; *Gage v. Rogers*, 20 Cal. 91; *Lattimer v. Ryan*, 20 Cal. 628; *Lamping v. Hyatt*, 27 Cal. 102; *Gautier v. English*, 29 Cal. 165; *Parrott v. Den*, 31 Cal. 81; *Walton v. Walton*, 32 Barb. (N. Y.) 203, 11 Abb. Pr. 231, 20 How. Pr. 347; reversed on another point, *40 N. Y. (1 Keyes) 15; *Simonson v. Blake*, 12 Abb. Pr. (N. Y.) 331, 20 How. Pr. 484.

³ See: CAL.—*Bond v. Pacheco*,

30 Cal. 530, 536; *Chase v. Christianson*, 41 Cal. 253; *Cohen v. Cohen*, 150 Cal. 99, 102, 11 Ann. Cas. 520, 88 Pac. 269. FLA.—*Einstein v. Davidson*, 35 Fla. 342, 356, 17 So. 563. ILL.—*Stillman v. Stillman*, 99 Ill. 196, 39 Am. Rep. 21. MASS.—*Albee v. Wyman*, 76 Mass. (10 Gray) 222; *Southworth v. Treadwell*, 168 Mass. 511, 47 N. E. 93. MISS.—*Bankston v. Bankston*, 27 Miss. 692. OHIO—*Onley v. Watts*, 43 Ohio St. 499, 3 N. E. 354. ORE.—*Brandt v. Brandt*, 40 Ore. 477, 67 Pac. 508. S. D.—*Mach v. Blanchard*, 15 S. D. 432, 439, 91 Am. St. Rep. 698, 58 L. R. A. 811, 90 N. W. 1042.

As to collateral attack on default judgment in excess of the amount demanded in complaint, see, note, 11 L. R. A. (N. S.) 803.

reversed;⁴ although there are cases holding such judgment to be void.⁵ But in any other case than a default of the defendant, as where issue is joined, the court may grant any relief consistent with the case made by the complaint and embraced within the issue;⁶ so that where there is an answer to the complaint, the prayer for relief becomes immaterial;⁷ e. g., in mandamus and quo warranto.⁸

After verdict, the granting of greater relief than the plaintiff has demanded in his prayer to his complaint, either with or without amendment to such prayer, is a matter resting in the sound judicial discretion of the trial court.⁹ Thus, interest may be awarded, although not asked for in the prayer,¹⁰ and may be allowed as damages for the negligent destruction of property,¹¹ although the court awards actual compensation for the loss only;¹² in an action for a partnership accounting the court may decree a dissolution of the partnership, although a dissolution is not prayed for in the complaint;¹³ where the

⁴ *Bond v. Pacheco*, 30 Cal. 530, 536.

⁵ See *Sache v. Wallace*, 101 Minn. 169, 174, 118 Am. St. Rep. 612, 11 Ann. Cas. 348, 11 L. R. A. (N. S.) 803, 809, 112 N. W. 386.

⁶ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 580. See *Savings & Loan Soc. v. Thompson*, 32 Cal. 347.

⁷ See cases cited in footnotes 2 and 6, this section, and also, *Johnson v. Polhemis*, 99 Cal. 240, 33 Pac. 908; *Dennison v. Chapman*, 105 Cal. 447, 39 Pac. 61; *Becker v. Pugh*, 9 Colo. 589, 13 Pac. 906; *Andrews v. Carlile*, 20 Colo. 370, 38 Pac. 465; *Marquet v. Marquet*, 12 N. Y. 336; *Bell v. Merrifield*, 109 N. Y. 202, 4 Am. St. Rep. 436, 14 N. Y. Civ. Proc. Rep. 146, 16 N. E. 55.

⁸ *People ex rel. Central Pac. R.*

Co. v. San Francisco Board Supervisors, 27 Cal. 655.

⁹ *Nevada County & Sacramento Canal Co. v. Kidd*, 37 Cal. 282, 305.

¹⁰ *Id.*; *Lane v. Gluckauf*, 28 Cal. 288, 87 Am. Dec. 121; *Cassacia v. Phoenix Ins. Co.*, 28 Cal. 631; *Gautier v. English*, 29 Cal. 168; *Corcoran v. Doll*, 32 Cal. 88; *Rhemke v. Clinton*, 2 Utah 230, 237.

¹¹ Court may instruct jury to give interest as damages in an action of trespass for destruction of property; or the jury may give interest as nomine as such damage. —*Rhemke v. Clinton*, 2 Utah 230, 237.

¹² *Lucas v. Wattles*, 49 Mich. 380, 13 N. W. 782; *Kendrick v. Towle*, 60 Mich. 361, 1 Am. St. Rep. 526, 27 N. W. 567.

¹³ *Hall v. Lonkey*, 57 Cal. 81.

complaint is broad enough, the court may grant plaintiff possession of property from which he has been ousted, although the prayer asks for damages only,¹⁴—and the like.

Theory of California procedural code is that the plaintiff shall specifically demand the relief to which he supposes himself entitled,¹⁵ and other procedural codes are formed on the same theory.¹⁶ But where a party asks for a specific relief, or for such other or further order as may be just, the court may afford any relief compatible with the facts of the case presented.¹⁷ And if specific relief can not be granted, such relief as the case authorizes may be had under a prayer for general relief.¹⁸ Thus, under a general prayer, the court may allow a deed to be reformed by inserting in it a power of revocation.¹⁹ It is, however, improper to include counsel fees and amount paid for taxes in the judgment, if not asked for in the prayer for relief.²⁰ To entitle plaintiff to relief

¹⁴ *Integral Quicksilver Min. Co. v. Altoona Quicksilver Min. Co.*, 75 Fed. 383.

¹⁵ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 426, subd. 3.

Effect of prayer to complaint discussed and qualified in *McComb v. Reed*, 28 Cal. 281, 87 Am. Dec. 115; *Lane v. Gluckauf*, 28 Cal. 288, 87 Am. Dec. 121; *Cassacia v. Phoenix Ins. Co.*, 28 Cal. 628; *Conger v. Gilmer*, 34 Cal. 77; *Nevada County & Sacramento Canal Co. v. Kidd*, 37 Cal. 282, 301; *Savings & Loan Soc. v. Thompson*, 37 Cal. 347; *Marquat v. Marquat*, 12 N. Y. 336, reversing 7 How. Pr. 417; *Emery v. Pease*, 20 N. Y. 62; *Van Dyke v. Jackson*, 1 E. D. Smith 419; *Jones v. Butler*, 30 Barb. (N. Y.) 641, 20 How. Pr. 189.

¹⁶ *Mills v. Thursby*, 2 Abb. Pr. (N. Y.) 432, 12 How. Pr. 385;

L'Amoreaux v. Atlantic Mut. Ins. Co., 11 N. Y. Super. Ct. Rep. (3 Duer) 680.

¹⁷ *People ex rel. Field v. Turner*, 1 Cal. 152; *Cummings v. Cummings*, 75 Cal. 434, 17 Pac. 442; *Nevin v. Lulu & White Silver Min. Co.*, 10 Colo. 357, 15 Pac. 611; *Gillett v. Clark*, 6 Mont. 190, 9 Pac. 823; *Kleinschmidt v. Steele*, 15 Mont. 181, 38 Pac. 827.

¹⁸ *People ex rel. Field v. Turner*, 1 Cal. 152; *Truebody v. Jacobson*, 2 Cal. 269; *Rollins v. Forbes*, 10 Cal. 299; *Ross v. Purse*, 17 Colo. 24, 28 Pac. 473; *Dykers v. Townsend*, 24 N. Y. 62; *Hemson v. Decker*, 29 How. Pr. (N. Y.) 385.

¹⁹ *Grafton v. Remsen*, 16 How. Pr. (N. Y.) 32.

²⁰ *Janson v. Smith*, Cal. Sup. Ct., January Term, 1866, not anywhere reported.

in equity, it must be shown that he is without remedy at law;²¹ yet it has been said that a court of equity has jurisdiction, at the suit of a purchaser at sheriff's sale, to set aside a fraudulent deed of the judgment debtor, without an averment of the insolvency of such judgment debtor.²²

§ 869. — ALTERNATIVE RELIEF. The general rule is that a demand for judgment in the alternative is improper.¹ But in actions for equitable relief, the complaint may be framed with a double aspect where there is doubt as to the particular relief to which the plaintiff is entitled.² Where a complaint is framed with a view to alternative relief, and on the trial the plaintiff prosecutes only one aspect of his cause, the other aspect will be treated as waived, and will not be considered or passed upon by the court.³

§ 870. — AMOUNT OF MONEY OR DAMAGES. The California procedural code requires that when the recovery of money or damages is demanded, the amount thereof must be stated,¹ and similar provisions are to be found in other procedural codes; but there is no rule of pleading

²¹ *Lupton v. Lupton*, 3 Cal. 120; *Parker v. Winnipiseogee Lake Cotton Co.*, 67 U. S. (2 Black.) 545, 17 L. Ed. 333.

As to what averments on face of bill in equity entitle plaintiff to relief, see *Griffing v. Gibb*, 67 U. S. (2 Black.) 519, 17 L. Ed. 353.

²² *Hager v. Shindler*, 29 Cal. 47, 55, 56; *Haskell v. Sutton*, 53 W. Va. 206, 217, 44 S. E. 533, 537. See *Judson v. Lyford*, 84 Cal. 505, 508, 24 Pac. 286; *Bull v. Bray*, 89 Cal. 286, 300, 13 L. R. A. 576, 26 Pac. 873; *Banning v. Purinton*, 105 Iowa 642, 645, 75 N. W. 639; *Ogden State Bank v. Barker*, 12 Utah 13, 24, 40 Pac. 675; *Wilson v. Spear*, 68 Vt. 145, 148, 34 Atl. 429.

¹ See *Mobile Sav. Bank v. Burke*,

94 Ala. 125, 10 So. 328; *Durant v. Gardner*, 10 Abb. Pr. (N. Y.) 445, 19 How. Pr. 94; *Maxwell v. Farnam*, 7 How. Pr. (N. Y.) 236; *Anderson v. Speers*, 58 How. Pr. (N. Y.) 68, 8 Abb. N. C. 382.

² *Wood v. Seely*, 32 N. Y. 105; *Warwick v. New York, City of*, 28 Barb. (N. Y.) 210, 7 Abb. Pr. 265; *People v. New York, City of*, 28 Barb. (N. Y.) 240, 8 Abb. Pr. 7, 17 How. Pr. 56; *Young v. Edwards*, 11 How. Pr. (N. Y.) 201; *Lyke v. Post*, 65 How. Pr. (N. Y.) 298; *Wood v. Rayburn*, 18 Ore. 3, 22 Pac. 521.

³ *Wood v. Rayburn*, 18 Ore. 3, 22 Pac. 521.

¹ *Kerr's Cyc. Cal. Code Civ. Proc.* § 426, subd. 3.

which requires a party to aver the precise amount he claims; he may recover a less amount than that which is stated in the complaint,² but a judgment for a greater amount will be erroneous,³ or void,⁴ according to the rule prevailing in the particular jurisdiction. And where there are two independent counts in the complaint, each complete within itself, and concluding with a prayer for relief, and a verdict for the plaintiff on one count only, the relief will follow the prayer of that count.⁵ Under the Colorado Code, the form of the prayer seems to be immaterial, and a demurrer will not lie to the whole bill on account of a specific prayer.⁶ And where an answer is filed and the action is contested, the plaintiff may, where the evidence justifies it, recover judgment for a larger amount than that prayed for in the complaint.⁷ It has been held, however, that if a specific sum is demanded, a greater amount can not be given without an amendment of the complaint in that respect.⁸

§ 871. — **LEGAL AND EQUITABLE RELIEF.** The prayer of a complaint may seek both legal and equitable relief where the matter arises out of the same transaction;¹ but they must be separately stated in the complaint.² In those cases in which both legal and equitable relief are

² *Meek v. McClure*, 49 Cal. 623, 627.

³ See, ante, § 868, footnotes 3 and 4.

⁴ *Id.*, footnote 5.

⁵ *Nevada County & Sacramento Canal Co. v. Kidd*, 37 Cal. 282.

⁶ *Waterbury v. Fisher*, 5 Colo. App. 362, 38 Pac. 846. See *Riser v. Walton*, 78 Cal. 490, 21 Pac. 362.

⁷ *Ohio Creek Anthracite Coal Co. v. Hinds*, 15 Colo. 173, 25 Pac. 502.

⁸ *Burke v. Koch*, 75 Cal. 356, 17 Pac. 228; *Miles v. Walther*, 3 Mo. App. 96.

¹ *Houghtaling v. Ellis* (dis. op.),

1 Ariz. 383, 387, 25 Pac. 534; *Gates v. Kieff*, 7 Cal. 125; *Marius v. Bicknell*, 10 Cal. 217, 224; *Weaver v. Conger*, 10 Cal. 233, 237; *Rollins v. Forbes*, 10 Cal. 300; *Hill v. Taylor*, 22 Cal. 191; *Eastman v. Truman*, 24 Cal. 382; *Gray v. Dougherty*, 25 Cal. 266; *More v. Massini*, 32 Cal. 595, 596; *Hughes v. Dunlap*, 91 Cal. 385, 390, 27 Pac. 642.

² *Gates v. Kieff*, 7 Cal. 124; *New York Ice Co. v. Northwestern Ins. Co.*, 23 N. Y. 357, 12 Abb. Pr. 414, 12 How. Pr. 296; *Getty v. Hudson River R. Co.*, 6 How. Pr. 269, 10 N. Y. Leg. Obs. 85; *Lamport v. Abbott*, 12 How. Pr. (N. Y.) 340.

sought in the same pleading, but the right to such relief is based upon the same facts, a demurrer upon the ground that several causes of action are improperly joined and that they are not separately stated can not be sustained.³ The grounds of equitable interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought.⁴ Thus a prayer for an injunction is proper in an action of trespass;⁵ or where suit is brought to test the priority of the appropriation of water;⁶ or on foreclosure of a mortgage to restrain waste during the period of redemption.⁷ But a prayer can not include a demand for two kinds of relief inconsistent with each other, as for redelivery of and damages for the detention and conversion of personal property;⁸ or for general relief and for judgment in a specified sum for a money demand on a contract.⁹ But such prayer will not be struck out.¹⁰ And the court will not resort to rules of construction to determine the species of relief demanded;¹¹ but, although the prayer be inartificially framed, the court will grant relief.¹² Under the liberal rules of our Code the complaint must be taken as a whole, and mere failure to make the prayer conform to the causes of action set forth in the complaint will not preclude the plaintiff from obtaining the relief which the complaint seeks, but which the prayer omits. A party can not state one set of facts in his complaint, pray for the

³ *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549, 29 L. R. A. 839, 41 Pac. 495

⁴ *Natoma Water & Min. Co. v. Clarkin*, 14 Cal. 544.

⁵ *Gates v. Kleff*, 7 Cal. 125; *Hughes v. Dunlap*, 91 Cal. 385; 27 Pac. 642.

⁶ *Marcus v. Bicknell*, 10 Cal. 217.

⁷ *Hill v. Taylor*, 22 Cal. 191.

⁸ *Maxwell v. Farnam*, 7 How. Pr. (N. Y.) 236.

⁹ *Durant v. Gardner*, 10 Abb. Pr. (N. Y.) 445.

¹⁰ *Hemson v. Decker*, 29 How. Pr. (N. Y.) 385.

¹¹ *Gates v. Kleff*, 7 Cal. 125.

¹² *People ex rel. Field v. Turner*, 1 Cal. 152; *Truebody v. Jacobson*, 2 Cal. 269; *Stewart v. Hutchinson*, 29 How. Pr. (N. Y.) 181.

relief which those facts would authorize, and get judgment upon another set of facts.¹³

Relief to which plaintiff is entitled against any one of two or more defendants is not limited by his prayer for relief against other defendants, and he is entitled to any relief justified by the facts alleged in the complaint, if proved or admitted.¹⁴ It is held that a prayer in an equity action which seeks relief inconsistent with the theory of the complaint will be disregarded as immaterial matter.¹⁵

¹³ Northern R. Co. v. Jordan, 87 Cal. 23, 25 Pac. 273; Reed v. Norton, 99 Cal. 617, 34 Pac. 333; First Nat. Bank v. Campbell, 2 Colo. App. 271, 30 Pac. 357.

¹⁴ Tyler v. Mayre, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196.

¹⁵ Arnold v. Sinclair, 11 Mont. 556, 28 Am. St. Rep. 489, 29 Pac. 340.

CHAPTER VI.

DEMURRER—IN GENERAL.

I. DEFENDANT'S DEMURRER.

- § 872. In general.
- § 873. — An objection merely—Distinguished from a motion for judgment.
- § 874. — Speaking demurrers.
- § 875. As to time when demurrer to be filed—In general.
- § 876. — Curing defects by answer.
- § 877. Waiver of objections—By failure to demur.
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- § 880. Mode of taking objection—In general.
- § 881. — Stating facts in demurrer.
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- § 883. When demurrer will lie.
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- § 885. What demurrer reaches—Defects in prayer.
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- § 887. — General demurrer.
- § 888. — — Breach of contract—Nonpayment.
- § 889. — Special demurrer—Common-law rule.
- § 890. Testing complaint by demurrer—In general.
- § 891. — Sufficiency and effect of demurrer.
- § 892. — Averments in pleading alone considered.
- § 893. — Action against garnishee.
- § 894. — Action for recovery of personal property.
- § 895. — Action for removing fixtures.
- § 896. — Action to annul homestead.
- § 897. — Action to contest right to purchase state lands.
- § 898. — Action to contest right to mining claim.
- § 899. — Action to determine right to patent.
- § 900. — Allegation of damages in action for personal injuries.
- § 901. — Alleging mutual mistake.

- § 902. — Allegation negating presumption of payment.
- § 903. — Allegation of probate of will: Ownership.
- § 904. — Alleging unilateral contract.
- § 905. — Failure to allege performance of conditions precedent—Demand.
- § 906. — Injunction—Charging interference with franchise.
- § 907. — Reformation of instrument — Failure to include property.
- § 908. — Specific performance of contract to convey—Execution and acknowledgment of contract.
- § 909. — Trust involved—Constructive or resulting.
- § 910. — Will contest—Allegations necessary.

II. PLAINTIFF'S DEMURRER.

§ 911. In general.

I. Defendant's Demurrer.

§ 872. IN GENERAL. The office of a demurrer is to deny the legal sufficiency of a pleading,—or of proofs offered, where there is a demurrer to the evidence on the trial of a cause,—and to raise an issue of law on the face of the complaint from the facts as stated therein.¹ A demurrer to the pleadings, as distinguished from a demurrer to the evidence, is made a pleading by the California procedural code,² the grounds thereof specified,³ the method of thus objecting regulated,⁴ the defects that may be reached by this method of objecting pointed out;⁵ and, like any other pleading, may be amended.⁶ A demurrer admits, for the purposes of such demurrer, such probative facts as are

¹ Brennan v. Ford, 46 Cal. 8, 13; Wilson v. New York, City of, 6 How. Pr. (N. Y.) 6, 16 How. Pr. 500, 502; Rice v. Rice, 13 Ore. 337, 340, 10 Pac. 495.

² Kerr's Cyc. Cal. Code Civ. Proc., 2nd ed., § 422; Consolidated Supp. 1906-1913, p. 1441.

³ As to defendant's causes or grounds of demurrer. See, post, §§ 912 et seq.

⁴ Kerr's Cyc. Cal. Code Civ. Proc., 2nd ed., § 431; Consolidated Supp. 1906-1913, p. 1255.

⁵ See, post, §§ 912 et seq.

⁶ Morrison v. Miller, 46 Iowa 84.

issuable and well pleaded,⁷ but not immaterial allegations, or averments of mere conclusions of the pleader⁸ or of law,⁹ though stated in the complaint.¹⁰ It is not the office

⁷ CAL.—Branham v. San Jose, City of, 24 Cal. 85, 602; Collins v. Driscoll, 69 Cal. 550, 11 Pac. 244; Union Trust Co. v. State, 154 Cal. 716, 24 L. R. A. (N. S.) 1111, 99 Pac. 183; Cahill v. Stone Co., E. B. & A. L., 135 Cal. 571, 19 L. R. A. (N. S.) 1094, 96 Pac. 84; Richard v. Farmers' & Merchants' Bank, 7 Cal. App. 387, 94 Pac. 393; Shannon v. Cavanaugh, 12 Cal. App. 434, 107 Pac. 574; Spangenberg v. Spangenberg, 19 Cal. App. 439; 126 Pac. 379. COLO.—Williams v. Routt County Commrs., 37 Colo. 55, 84 Pac. 1109. NEV.—Levy v. Ryland, 32 Nev. 460, 109 Pac. 905. N. Y.—Masterson v. Townsend, 123 N. Y. 458, 10 L. R. A. 816, 25 N. E. 928. OKLA.—Adams v. Couch, 10 Okla. 17, 26 Pac. 1009. S. C.—Bomar v. Means, 37 S. C. 520, 34 Am. St. Rep. 772, 16 S. E. 537. FED.—Hopper v. Covington, City of, 118 U. S. 148, 3 L. Ed. 190, 6 Sup. Ct. Rep. 1025, affirming 10 Biss. 488, 8 Fed. 777.

See, also, discussion and authorities, post, § 882.

⁸ Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa 312, 31 Am. St. Rep. 477, 12 L. R. A. 436, 3 Inters. Com. Rep. 584, 48 N. W. 98.

Conclusion, based on another conclusion, and not amounting to an allegation of probative fact, its correctness or truth is not admitted by demurrer.—Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa 312, 31 Am. St. Rep. 477, 12 L. R. A. 436, 3 Inters. Com. Rep. 584, 48 N. W. 98.

As to conclusions of the pleader, see, ante, § 714.

⁹ ARIZ.—Gill v. Manhattan Life Ins. Co., 11 Ariz. 232, 95 Pac. 89. CAL.—Burling v. Newlands, 112 Cal. 476, 44 Pac. 810; Butner v. Kasser, 19 Cal. App. 755, 127 Pac. 811. N. M.—First Nat. Bank v. Lewinson, 12 N. M. 147, 76 Pac. 288. N. Y.—Hall v. Bartlett, 9 Barb. 297. WIS.—Pratt v. Lincoln County, 61 Wis. 62, 20 N. W. 726; Peake v. Buell, 90 Wis. 508, 48 Am. St. Rep. 946, 36 N. W. 1053. WYO.—State v. Irvine, 14 Wyo. 318, 84 Pac. 90; affirmed, 206 U. S. 278, 51 L. Ed. 1063, 27 Sup. Ct. Rep. 613.

As to conclusions of law, see, ante, § 715.

Allegation of conclusions of law tenders no issue.—Braham v. San Jose, 24 Cal. 585, 602; People v. Lanterman, 9 Cal. App. 674, 681, 100 Pac. 722; Smith v. Rogers County Commrs., 26 Okla. 822, 110 Pac. 670.

¹⁰ CAL.—Branham v. San Jose, City of, 24 Cal. 585, 602. IOWA—Smith v. Henry County, 15 Iowa 385. NEB.—American Water Works Co. v. State, 46 Neb. 194, 199, 50 Am. St. Rep. 610, 612, 30 L. R. A. 447, 64 N. W. 711. N. Y.—Cutler v. Wright, 22 N. Y. 472; Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; Bonnell v. Griswold, 68 N. Y. 294; Buffalo Catholic Inst. v. Bitter, 87 N. Y. 250; Freeman v. Frank, 10 Abb. Pr. 370; Hall v. Bartlett, 9 Barb. 297; Groesbeeck v. Dunscomb, 41 How. Pr. 302. ORE.—Longshore Printing Co. v. Howell, 26 Ore. 527, 46 Am. St. Rep. 640, 28 L. R. A. 464,

of a demurrer to set out facts. All the facts involved in a demurrer are those alleged in the pleading demurred to, and the demurrer merely raises a question of law as to the sufficiency of those facts to constitute a cause of action or defense.¹¹ By the old common-law writers it was claimed not to be a plea, because it neither alleged nor denied any fact.¹² But this is not now the rule;¹³ and most, if not all, of the procedural codes make a demurrer a pleading.¹⁴ Yet, whether, technically speaking, it is a plea or not, in many instances it is the most important paper in the action, and, when properly interposed, it may settle all the issues of the case, by determining, at the threshold of the action, questions which otherwise would be disposed of on the hearing of the facts only. The question whether the

38 Pac. 547. FED.—Dundee Mortgage & Trust Invest. Co. v. Hughes, 10 Sawy. 147, 20 Fed. 39.

Unnecessary allegations in complaint, or allegations which are contrary to the facts of which judicial notice is taken, are not admitted by demurrer.—French v. State Senate, 146 Cal. 604, 2 Ann. Cas. 756, 69 L. R. A. 556, 80 Pac. 1031.

¹¹ Brennon v. Ford, 46 Cal. 12; Rice v. Rice, 13 Ore. 337, 10 Pac. 495; Johnson v. Burnside, 3 S. D. 230, 52 N. W. 1057.

¹² Gould's Pl. 35; 2 Chit. Pl. 678; 3 Id. 1246.

Demurrer derived from the Latin *demorari*, or the French *demorrer*, to wait or stay, and imports, according to its etymology, that the objecting party will not proceed with the pleading, because no sufficient statement has been made on the other side; but will await the judgment of the court whether he is bound to answer.—Stephen on Pleading (Williston's ed.), p. 49.

¹³ Oliphant v. Whitney, 34 Cal. 25, 27; New Jersey v. New York, 21 U. S. (6 Pet.) 323, 8 L. Ed. 414; Furniss v. Ellis, 2 Brock. 14, Fed. Cas. No. 5162.

Considered as an answer under proceedings relative to default.—Oliphant v. Whitney, 34 Cal. 25, 27. See Smith v. Clyne, 16 Idaho 468, 101 Pac. 819; Dibble v. Hanson, 17 N. D. 23, 114 N. W. 372.

Demurrer is an answer within the meaning of California Code of Civil Procedure, § 585.—Fletcher v. Maginnis, 136 Cal. 362, 363, 68 Pac. 1015.

Filing of demurrer must be made before party "demurs," and this must be done within the time allowed by law for an answer.—Fletcher v. Maginnis, 136 Cal. 362, 363, 68 Pac. 1015.

¹⁴ See, also, Cashman v. Reynolds, 123 N. Y. 138, 25 Abb. N. C. 392, 19 N. Y. Civ. Proc. Rep. 161, 25 N. E. 162, affirming 56 Hun 333, 24 Abb. N. C. 455, 18 N. Y. Civ. Proc. Rep. 317, 9 N. Y. Supp. 614.

plaintiff in his complaint has stated facts sufficient to constitute a cause of action, is thus disposed of without the introduction of testimony, or the form of a trial.

§ 873. — AN OBJECTION MERELY—DISTINGUISHED FROM MOTION FOR JUDGMENT. From what has been said in the foregoing section it is apparent that a demurrer is in effect and in fact merely an objection to the sufficiency of the pleading against which it is interposed;¹ and upon demurrer nothing can be considered except the matters appearing in the face of the complaint from the allegations thereof.² A demurrer is to be distinguished from a motion for judgment on the pleadings, although such a motion, like a demurrer, raises an issue of law only,³ and for that reason partakes of the nature of a demurrer, in that it admits all facts that are well pleaded; but, if sustained, judgment goes at once, and in this it differs from a demurrer. If the demurrer is sustained, the order is not a final judgment; and the party has a right to plead over.⁴

§ 874. — SPEAKING DEMURRERS. A “speaking demurrer” is one which sets up as a ground of objection, and requires to sustain it, something which does not appear in the face of the pleading to which it is interposed, not judicially known, and not legally presumed to be true;¹

¹ *Wapello State Sav. Bank v. McDonald*, 138 Mo. App. 328, 122 S. W. 5; *O'Day v. Sanford*, 138 Mo. App. 343, 122 S. W. 3.

² *Porter v. Pecos & N. T. R. Co.*, 56 Tex. Civ. App. 479, 121 S. W. 897.

³ *State ex rel. Attorney General v. Simmons Hardware Co.*, 109 Mo. 118, 15 L. R. A. 676, 18 S. W. 1125; *Wertheimer-Swarts Shoe Co. v. McDonald*, 138 Mo. App. 328, 122 S. W. 5.

⁴ *Sternberg v. Levy*, 159 Mo. 617, 53 L. R. A. 438, 60 S. W. 1114; *Wertheimer-Swarts Shoe Co. v. McDonald*, 138 Mo. App. 328, 122 S. W. 5.

¹ GA.—*Warren v. Bearden*, 16 Ga. App. 145, 84 S. E. 597; *Miller v. Southern R. Co.* (Ga. App.), 94 S. E. 619. MICH.—*Walker v. Conant*, 65 Mich. 194, 31 N. W. 786. N. C.—*Von Glalin v. De Rossett*, 76 N. C. 292; *Davison v. Gregory*, 132 N. C. 389, 43 S. E. 916; *Kendall v. Highway Commission*, 161 N. C. 600, 81 S. E. 995. PA.—*Wright v. Weber*, 17 Pa. Sup. Ct. Rep. 451, 455. TENN.—*Powers v. Journeyman Bricklayers'*

that is, a demurrer that alleges affirmative matter which, taken with the allegations in the complaint, shows that no cause of action is stated. Such a demurrer has no place in the jurisprudence of those states having the reformed procedure; the matter dehors the complaint can not be considered,² and the demurrer should be overruled.³ A demurrer must be directed at the complaint only, and can not be aided by any averment or showing of facts extraneous to it;⁴ where any new matter in pais is alleged in a demurrer, it is, as to such new matter at least, improper,⁵ and can not be considered.⁶

Illustrations of this vice in a demurrer are found, among other things, in assuming things not shown in the pleading demurred to;⁷ in misstatement of allegations in pleading demurred to;⁸ in demurring because a person named, and described as an heir at law, was not joined, there being nothing in the complaint to show that deceased left such an heir;⁹ demurrer founded upon terms of contract not set out in the complaint;¹⁰ in action against a bank for damages for payment of forged draft, demurrer

Union, 130 Tenn. 643, 172 S. W. 284. FED.—Richardson v. Loree, 36 C. C. A. 301, 94 Fed. 375.

See, also, discussion and authorities, post, § 881.

² Douglass v. Blankenship, 50 Ind. 160; Richardson v. Loree, 36 C. C. A. 301, 94 Fed. 375.

No part of office of demurrer to bring in new facts not set out in complaint.—Douglass v. Blankenship, 50 Ind. 160.

³ Beckner v. Beckner, 104 Ga. 219, 30 S. E. 622; Teasley v. Bradley, 110 Ga. 497, 78 Am. St. Rep. 117, 35 S. E. 782; Oliver v. Powell, 114 Ga. 592, 40 S. E. 826; Reid v. Caldwell, 120 Ga. 718, 48 S. E. 191; Wright v. Weber, 17 Pa. Super. Ct. Rep. 451, 455.

⁴ Hubbard v. Salvens, 218 Mo. 598, 117 S. W. 1104.

⁵ Western R. of Alabama v. Foshee (Ala.) 62 So. 500; Chewing v. Knight (Ala.), 77 So. 969; Coffman v. Gates, 142 Mo. App. 648, 121 S. W. 1078; Pyle v. Park (Tex. Civ. App.), 196 S. W. 243.

⁶ See authorities in footnote 2, this section.

⁷ State v. Buchanan (Tenn.), 52 S. W. 480.

⁸ Ivins v. Jacob, 69 N. J. Eq. 643, 60 Atl. 1125.

⁹ Mallin v. Fordham, 11 Ga. 364, 40 S. E. 324.

¹⁰ Haber-Blum-Bloch Hat Co. v. Southern Bell Tel. & Tel. Co., 118 Ga. 874.

on ground the bank had nothing to do with the draft except to forward it for collection;¹¹ to a complaint in equity to construe or reform a deed executed by a deceased person as trustee, containing no allegations regarding the appointment of a successor, a demurrer on the assumption that such successor has been appointed;¹² to a complaint in trespass quare clausum fregit, demurrer on the ground that plaintiff's exclusive remedy is by petition for a jury to assess damages, as provided by a local public law, which is named;¹³ and the like.

§ 875. AS TO TIME WHEN DEMURRER TO BE FILED — IN GENERAL. Under the provisions of the California procedural code, — and similar provisions are found in other jurisdictions having the reformed procedure, — the defendant must demur to the complaint within the time which is allowed him by law in which to answer the complaint; and this provision as to time covers each of the nine separate grounds¹ on which the defendant may demur.²

§ 876. — CURING DEFECT BY ANSWER. In those cases in which a complaint is defective by reason of the omission of some material allegation, it may be aided by the pleading of the adverse party. The rule is that, if the omitted allegation be supplied by the adverse pleading, it is the same as if it were inserted in the party's own pleading.¹ Thus, if a complaint fails to set forth material facts so that no cause of action is stated, but the answer avers such facts, the omission in the complaint becomes immaterial, and the defect therein is cured by the answer.²

¹¹ Woods v. Colony Bank, 114 Ga. 683, 56 L. R. A. 929, 40 S. E. 720.

¹² Clarke v. East Atlanta Land Co., 113 Ga. 21, 38 S. E. 323.

¹³ Kendall v. Highway Commrs., 165 N. C. 600, 81 S. E. 995.

¹ As to causes or grounds of defendant's demurrer, see, post, §§ 912 et seq.

² Kerr's Cyc. Cal. Code Civ. Proc., 2nd ed., § 430, introductory clause; Consolidated Supp. 1906-1913, p. 1450.

¹ Ferrera v. Parke, 19 Ore. 141, 23 Pac. 883.

² CAL. — Schenck v. Hartford Fire Ins. Co., 71 Cal. 28; Moffat v. Greenwalt, 90 Cal. 368, 27 Pac. 296; Burns v. Cushing, 96 Cal. 669,

So the omission of a material fact in a complaint is cured by its averment in a cross-complaint of the defendant, and the admission of the averment in the answer to the cross-complaint. And the fact that there is a demurrer to the complaint does not take the case out of the rule of express aider.³ But admissions made in the statement of a separate affirmative defense are not to be taken as facts upon a controverted question otherwise at issue in the pleadings by appropriate allegation and denial.⁴

§ 877. **WAIVER OF OBJECTIONS**—**BY FAILURE TO DEMUR.** A failure to object to a complaint by demurrer, either general or special, and the trial of the cause as if the complaint were in all respects sufficient, no error or defect therein which does not affect the substantial rights of the parties will be ground for reversal of the judgment.¹ So, objections to a complaint which are grounds of special demurrer are waived where the demurrer is general and no special grounds are specified therein.² Moreover, in aid of the judgment, the complaint must receive as favorable an interpretation as its general scope will warrant, mere defects in the manner of stating the facts will be

31 Pac. 1124; *Shively v. Semi-Tropic Land & Water Co.*, 99 Cal. 259, 33 Pac. 848. **COLO.**—*Limberg v. Higenbotham*, 11 Colo. 156, 17 Pac. 481; *Robinson Consol. Min. Co. v. Johnson*, 13 Colo. 258, 22 Pac. 459. **MONT.**—*Hamilton v. Great Falls Street R. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713. **ORE.**—*Drake v. Swarts*, 24 Ore. 198, 33 Pac. 563.

See *Pomeroy on Remedies and Remedial Rights*, § 579.

³ *Cohen v. Knox*, 90 Cal. 266, 13 L. R. A. 711, 27 Pac. 215; *Robinson Consol. Min. Co. v. Johnson*, 13 Colo. 258, 22 Pac. 459.

⁴ *Hayes v. Williams*, 17 Colo. 465, 30 Pac. 352.

¹ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 434; *Reynolds v. Lincoln*, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449; *People v. Reis*, 76 Cal. 269, 18 Pac. 309.

As to waiver of objections to complaint on special grounds, by failure to demur, see *Malone v. Stillwell*, 15 Abb. Pr. (N. Y.) 421.

Objection complaint does not state cause of action, is not waived by a failure to demur, and may be taken advantage of at any time.—See *Parker v. Bond*, 5 Mont. 1, 1 Pac. 209.

² *Daggett v. Gray*, 110 Cal. 169, 42 Pac. 568.

disregarded; if a cause of action is stated in the complaint, though defectively, the complaint must be sustained, notwithstanding any ambiguity or uncertainty that may exist.³ Where no demurrer is interposed to the complaint, all merely technical objections thereto are waived.⁴ But the ground of a general demurrer is neither waived by failure to demur nor by consent that the demurrer be overruled.⁵ The submission of a demurrer without argument is not a waiver of any objection raised thereby.⁶ Nor is the right to demur waived by calling for a bill of particulars.⁷ The objection to misjoinder of parties appearing upon the face of the complaint or petition is waived by failure to specify it properly as a ground of demurrer, and can not be thereafter urged.⁸ When defendants enter upon and proceed to trial upon the merits without demanding a ruling upon a demurrer they waive the demurrer.⁹ If the defendant demurs and afterwards answers, but before trial withdraws the answer and allows judgment to be entered, it will be presumed that he waived the demurrer, where the record discloses nothing to the contrary.¹⁰ But a demurrer is not waived by the filing of an answer upon leave given by the court

³ *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. 1024. See *Glide v. Dwyer*, 83 Cal. 477, 23 Pac. 706.

As to construction of pleadings, see, ante, § 751 et seq.

As to ambiguity as ground of demurrer, see, post, §§ 1000-1008.

As to uncertainty as ground of demurrer, see, post, §§ 1010-1023.

⁴ *Dennison v. Chapman*, 105 Cal. 447, 453, 39 Pac. 61; *Orman v. Mannix*, 17 Colo. 564, 31 Am. St. Rep. 340, 17 L. R. A. 602, 30 Pac. 1037.

⁵ *Evens v. Gerken*, 105 Cal. 311, 38 Pac. 725; *Porter v. Booth*, 1 S. D. 558, 47 N. W. 960.

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⁶ *Richards v. Traveler's Ins. Co.*, 80 Cal. 505, 22 Pac. 939.

⁷ *Mulvey v. Staab*, 4 N. M. 50, 12 Pac. 699.

⁸ *O'Callahan v. Bode*, 84 Cal. 489, 24 Pac. 269; *People ex rel. Jones v. District Court*, 18 Colo. 293, 32 Pac. 819; *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760.

See, also, post, § 941.

⁹ See, post, § 878.

¹⁰ *Brooks v. Douglass*, 32 Cal. 208, 212; *Guthrie v. Phelan*, 2 Idaho 89, 91, 6 Pac. 107; *Smith v. Clyne*, 16 Idaho 466, 470, 101 Pac. 820; *Evans v. Jones*, 10 Utah 182, 210, 37 Pac. 262.

after the demurrer is overruled.¹¹ Objections against a complaint which should have been made by demurrer on the ground of uncertainty can not be urged upon appeal, where no demurrer has been filed in the trial court;¹² because a defective statement of facts in the complaint is waived by joining issue upon them;¹³ and where an action is prosecuted jointly against two persons, any objection on the ground of misjoinder is waived by answering,—the objection must be taken by a demurrer before answer.¹⁴

§ 878. — BY FAILURE TO OBTAIN RULING ON DEMURRER. In those cases in which the defendant demurs on any of the grounds specified in the statute,¹ but fails to press his demurrer and obtain a ruling thereon, he is deemed to have waived the objection by asking for a judgment on the merits of the cause,² and will not be allowed to urge the objection at any subsequent stage of the cause; and the same rule applies where the party allows judgment to be entered without demanding a ruling upon his demurrer.³

Cause of action not stated by complaint for want of essential facts, objection thereto is not waived by a failure to demur, nor cured by a verdict or judgment, and the point may be urged upon appeal, notwithstanding the failure to demur thereto.⁴

¹¹ See, post, § 879.

¹² Seligman v. Mando, 94 Cal. 314, 29 Pac. 710.

¹³ Davis v. Wait, 12 Ore. 425, 8 Pac. 356.

¹⁴ Gruhn v. Stanley, 92 Cal. 86, 28 Pac. 56.

¹ As to grounds of defendant's demurrer, see, post, §§ 912 et seq.

² CAL.—Silcox v. Lang, 78 Cal. 118, 125, 20 Pac. 297. COLO.—Danielson v. Gude, 11 Colo. 87, 17 Pac. 283. MONT.—Francisco v. Benepe, 6 Mont. 243, 11 Pac. 637. ORE.—Olds v. Cary, 13 Ore. 362,

10 Pac. 786. S. D.—Wright v. Sherman, 3 S. D. 290, 52 N. W. 1093. UTAH—Spanish Fork City v. Hopper, 7 Utah 235, 26 Pac. 293.

See, also, cases cited, ante, § 877, footnote 10.

³ Evans v. Jones, 10 Utah 182, 37 Pac. 262.

⁴ Kerr's Cyc. Cal. Code Civ. Proc., § 434; Hurley v. Ryan, 119 Cal. 71, 51 Pac. 20; Bane v. Peerman, 125 Cal. 220, 57 Pac. 885; Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445; Cameron v. Ah Quong, 8 Cal. App. 310, 96 Pac. 1025.

§ 879. — BY ANSWERING OVER. The general rule is that a defendant waives his demurrer by answering over, at least as to every ground except a question of jurisdiction, or except the ground that the petition does not state facts sufficient to constitute a cause of action.¹ But this rule is modified or changed by many of the procedural codes; thus:

Under California procedural code, providing that a demurrer shall not be waived by filing an answer at the same time,² it has been held that answering over, on overruling of the demurrer, by leave of the court, does not waive the objection taken by the demurrer.³

*Under Utah Code of Civil Procedure*⁴ a party does not waive his demurrer by filing an answer at the same time, or after the demurrer, or by going to trial upon his answer; but it is questioned whether this applies to a demurrer that is special for ambiguity and uncertainty.⁵

§ 880. MODE OF TAKING OBJECTION—IN GENERAL. By the former chancery practice, the proper mode of taking advantage of any ground of defense apparent from the bill itself, either from its contents or from defect in its frame, or in the case made by it, was by demurrer.¹ The difference in the modern practice is that objection can not now be taken by demurrer to the frame or form of the bill; the remedy is by motion to make definite.²

¹ Jones v. Kansas City, F. S. & M. R. Co., 178 Mo. 528, 101 Am. St. Rep. 434, 77 S. W. 890; Hudson v. Cahoon, 193 Mo. 457, 91 S. W. 72; Hanson v. Neal, 215 Mo. 256, 114 S. W. 1073; Roberts v. Neale, 134 Mo. App. 612, 114 S. W. 1120.

See, also, cases, post, § 880, footnote 6.

² Kerr's Cyc. Cal. Code Civ. Proc., § 472.

³ Curtiss v. Bachman, 84 Cal. 210, 23 Pac. 379; Hurley v. Ryan, 119 Cal. 71, 72, 51 Pac. 20.

⁴ 2 Comp. Laws, § 3393.

⁵ Henderson v. Turngren, 9 Utah 432, 35 Pac. 495.

¹ 1 Barb. Ch. Pr. 105; 1 Mitf. Eq. Pl. 107.

² Howell v. Fraser, 1 N. Y. Code Rep. (N. S.) 270, 6 How. Pr. 221..

Objections by demurrer may be taken within the time prescribed by the statute for answering the complaint, that is to say: (1) If service of summons is had in the county where the action is brought, within ten days after service; (2) if defendant is served out of the county in which action is brought, or (3) if service is had by publication, the defendant has thirty days³ to answer after the service of the summons, or after the period for publication expires.⁴

These are the periods prescribed by the California statute; other statutes provide differing dates.

Demurrer shall be filed with the clerk, and a copy thereof served on the adverse party or his attorney.⁵ Where a demurrer to the complaint is put in and overruled, and the defendant then answers, the answer is a waiver of the demurrer, under the general⁶ and the former rule in California,⁷ but not under the procedural code of California and other states.⁸ The omission of the defendant to join in a demurrer to a plea is a waiver of objection to that plea.⁹ If demurrers are suffered to rest for three years, the court may then overrule them in its discretion, for want of prosecution.¹⁰

§ 881. — STATING FACTS IN DEMURRER. We have already seen that a statement of facts in a demurrer is not permissible.¹ The only office of a demurrer is to raise issues of law upon the facts stated in the pleading demurred to.² If it requires the slightest statement of facts

³ Kerr's Cyc. Cal. Code Civ. Proc., § 413; ante, § 875.

⁴ See, ante, § 206.

⁵ See, ante, § 872, footnote 13.

⁶ See, ante, § 879; *Barada v. Carondelet, Inhabitants of*, 8 Mo. 644; *Hammersmith v. Avery*, 18 Nev. 225, 2 Pac. 55; *Brown v. Saratoga R. Co.*, 18 N. Y. 495.

See, also, cases, ante, § 879, footnote 1.

⁷ See *De Boom v. Priestly*, 1 Cal. 206.

⁸ See, ante, § 879.

⁹ *Morsell v. Hall*, 13 How. Pr. (N. Y.) 212.

¹⁰ *Anderson v. Flisk*, 36 Cal. 625.

¹ See, ante, § 874.

² *Brennan v. Ford*, 36 Cal. 7; *Brooks v. Gibbons*, 1 Pal. Ch. (N. Y.) 374.

to make the defect in the complaint apparent, demurrer will not lie.³ The test of a demurrer is: Does it require any facts to sustain it?⁴ If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.⁵ A demurrer abandoned after service of an amended pleading is no longer a part of the record, and will be struck out of the appeal-book on motion.⁶ In a case brought upon a writ of error, which presented the appearance of a demurrer upon the record which had not been disposed of, where there was a verdict upon a *plea* of the general issue, and a judgment rendered thereon, the Supreme Court presumed that the demurrer had been either withdrawn or overruled.⁷ Notwithstanding a defendant in chancery demurs, and the demurrer is overruled, he may afterwards insist upon the same thing by his answer.⁸ And under the civil law, the party who demurred is not prevented from contesting the facts confessed in the demurrer, and compelling the opposite party to prove them.⁹ This is the modern practice.

§ 882. WHAT ADMITTED BY DEMURRER. We have already seen that a demurrer admits the matters of fact, since it refers the law arising upon the fact to the judgment of the court; and, therefore, the fact is taken to be true on such demurrer, or otherwise the court has no foundation on which to make any judgment.¹ But a demurrer admits

See, also, discussion and authorities, ante, §§ 872, 873.

³ *Dillaye v. Wilson*, 43 Barb. (N. Y.) 261; *Davy v. Betts*, 23 How. Pr. (N. Y.) 396.

⁴ *Struver v. Ocean Ins. Co.*, 16 How. Pr. (N. Y.) 422.

See, also, ante, § 874.

⁵ See, ante, § 877.

⁶ *Brown v. Saratoga R. Co.*, 18 N. Y. 495.

⁷ *Townsend v. Jemison*, 48 U. S. (7 How.) 706, 12 L. Ed. 880.

⁸ *Crawford v. William Penn, The*, 3 Wash. C. C. 484, Fed. Cas. No. 3373.

⁹ *Id.*

¹ See, ante, § 872, footnote 7.

only such facts as are issuable and well pleaded.² This case, however, involved only the former, the question being whether the demurrer admitted a statement in the complaint which was a mere conclusion of law. It was undoubtedly the rule at common law that a demurrer admitted only facts well or formally pleaded, but by statute a general demurrer confesses all matters pleaded, though informally.³ But a special demurrer admits only facts well pleaded.⁴ Irrelevant facts are not admitted.⁵ Where the pleading demurred to contains two contradictory averments, one of which the law adjudges to be a fiction, the demurrer admits only the averment which the law adjudges to be true.⁶ It admits the allegations of the bill, for the purposes of a motion on the bill.⁷ Where the court intimates that, conceding the facts to be true, yet the plaintiff could not recover, and the defendant admits the facts could be proved, this is deciding the case as on demurrer, or as on motion for nonsuit.⁸ But an admission of facts by a demurrer in one cause is not evidence of those facts in another cause, although between the same parties.⁹ So, a demurrer does not admit the truth of any new facts not appearing in the original pleading.¹⁰ And it never admits the law arising on those facts.¹¹

² *Branham v. San Jose, City of*, 24 Cal. 602.

³ See *Stephen on Pl.* 159, 160.

⁴ *Id.*; *People v. Goddard*, 8 Colo. 432, 7 Pac. 301; *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 15 Pac. 691; *Adams v. Couch*, 1 Okla. 17, 26 Pac. 1009.

⁵ NEV.—*Van Doren v. Tjader*, 1 Nev. 380, 90 Am. Dec. 498. N. Y.—*Hall v. Bartlett*, 9 Barb. 297.

⁶ *Freeman v. Frank*, 10 Abb. Pr. (N. Y.) 370. See, also: *Cutler v. Wright*, 22 N. Y. 472. PA.—*Commonwealth v. Commissioners*, 37 Pa. St. 277. FED.—*Commercial Bank v. Buckner*, 61 U. S. (20

How.) 108, 15 L. Ed. 862; *Griffing v. Gibb*, 67 U. S. (2 Black.) 519, 17 L. Ed. 353; *Greathouse v. Dunlap*, 3 McL. 303, Fed. Cas. No. 5742; *Foote v. Linck*, 5 McL. 616, Fed. Cas. No. 4913; *Bennion v. Davidson*, 1 Horn. & H. 48.

⁷ *Bayerque v. Cohen*, 1 McAll. 113, Fed. Cas. No. 1134.

⁸ *Snodgrass v. Ricketts*, 13 Cal. 359.

⁹ *Auld v. Hepburn*, 1 Cr. C. C. 122, 166, Fed. Cas. Nos. 650, 651.

¹⁰ *Van Doren v. Tjader*, 1 Nev. 380, 90 Am. Dec. 498.

¹¹ *Griggs v. St. Paul, City of*, 9 Minn. 246; *United States v. Arnold*,

Demurrer admits the truth of all allegations which are well pleaded, however improbable the facts alleged may be;¹² but where, however, allegations in a pleading are admitted for the purpose of a demurrer, they are admitted for that purpose only, and should not be at any later stage in the trial considered or commented on by the court as if they were de facto true;¹³ the facts are not admitted absolutely and so as to become evidence against the party demurring on any future action arising between the parties.¹⁴

§ 883. WHEN DEMURRER WILL LIE. A complaint or other pleading should not be demurred to: (1) Unless it is clearly vulnerable to a demurrer, and (2) for causes apparent upon the face of the pleading only.¹ Although the statute enumerates various causes or grounds for demurrer to a complaint,² and the further fact that several causes or grounds of demurrer may be joined in one demurrer, where the objection taken by each cause joined adheres in the complaint or other pleading in the manner above pointed out, yet these facts afford no excuse, and furnish no justification, for exhausting the statutory list of grounds on each pleading demurred to. Properly speaking a demurrer lies only when an entire pleading, that is an entire cause of action, is insufficient,³ as a part of a cause of action can not be demurred to;⁴ hence, if any part of a bill or other pleading demurred to is good, de-

¹ Gall. 348, Fed. Cas. No. 14,469; Hobson v. McArthur, 3 McL. 241, Fed. Cas. No. 6554.

¹² Woodruff v. Howes, 88 Cal. 184, 26 Pac. 111; Freeman v. Hart, 61 Iowa 525, 16 N. W. 597; Peterson v. Roach, 32 Ohio St. 374, 30 Am. Rep. 607.

¹³ Rice v. Rice, 13 Ore. 337, 10 Pac. 495; Day v. Brownrigg, 10 Ch. Div. 294.

¹⁴ Tomkins v. Ashby, 1 Moody & M. 32.

¹ Dillaye v. Wilson, 43 Barb. (N. Y.) 261; Davy v. Betts, 23 How. Pr. (N. Y.) 396.

² See, also, ante, §§ 872, 874.

³ 1 Van Santv. Eq. Pl. 184.

⁴ Hayden v. Anderson, 17 Iowa 158; Wait v. Ferguson, 14 Abb. Pr. (N. Y.) 379; Lord v. Vreeland, 15 Abb. Pr. (N. Y.) 122, 24 How. Pr. 316, affirming 13 Abb. Pr. 195; Mattoon v. Baker, 24 How. Pr. (N. Y.) 329.

murrer to the whole can not be sustained.⁵ If the complaint contains one good cause of action, a general demurrer to the whole complaint will not lie.⁶ A demurrer must be directed to the whole of a pleading, or to a particular and separate statement of a cause of action or defense. It can not be directed to certain lines thereof.⁷ On a general demurrer,—unless in the case of a demurrer for misjoinder of actions,⁸—judgment must be given for the plaintiff, if there is one good count in the complaint.⁹

⁵ CAL.—Whiting v. Heslep, 4 Cal. 327; Weaver v. Conger, 10 Cal. 233; Jones v. Iverson, 131 Cal. 101, 104, 63 Pac. 135. GA.—Griggs v. Thompson, 1 Ga. Dec. 146; Hollsclaw v. Johnson, 2 Ga. Dec. 146. IND.—Fancher v. Ingraham, 6 Blackf. 139. MO.—Marshall v. Bouldin, 8 Mo. 244. N. Y.—Souza v. Belcher, 3 Edw. Ch. 117; Livingston v. Livingston, 4 Johns. Ch. 294; Higinbotham v. Burnett, 5 Johns. Ch. 184; Kuypers v. Reformed Dutch Church, 6 Pal. Ch. 570; Parsons v. Browne, 7 Pal. Ch. 354; Cooper v. Clason, 1 N. Y. Code Rep. (N. S.) 347, 2 Edm. Sel. Cas. 320; Martin v. Mattison, 8 Abb. Pr. 3; Butler v. Wood, 10 How. Pr. 222; Jaques v. Morris, 2 E. D. Smith 639. FED.—Livingston v. Story, 54 U. S. (9 Pet.) 632, 9 L. Ed. 225; Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640; Parrott v. Barney, Deady 407, Fed. Cas. No. 10,773a.

See, also: 1 Beach on Modern Eq. Pr. § 247; Story's Eq. Pl. (9th ed.), § 443.

⁶ CAL.—Griffiths v. Henderson, 49 Cal. 566; Fleming v. Albeck, 67 Cal. 226, 7 Pac. 659; McCann v. Pennie, 100 Cal. 547, 35 Pac. 158. N. Y.—Victory Webb Printing Co.

v. Peters, 26 Hun 48; affirmed, 94 N. Y. 651. WASH.—McCartney v. Glassford, 1 Wash. St. 579, 20 Pac. 423. WIS.—Pinkum v. Eau Claire, City of, 81 Wis. 301, 51 N. W. 550.

⁷ Locke v. Peters, 65 Cal. 161, 3 Pac. 357; Reed v. Drias, 67 Cal. 491, 8 Pac. 20; Herfort v. Cramer, 7 Colo. 483, 4 Pac. 896.

⁸ Ferguson v. Burt, 2 Utah 388, 392.

⁹ CAL.—Young v. Pearson, 1 Cal. 448; Stoddard v. Treadwell, 26 Cal. 294, 302; Clark v. Smith, 66 Cal. 645, 653, 4 Pac. 689, 6 Pac. 732. N. Y.—Whitney v. Crosby, 3 Cal. 89; Ward v. Sockrider, 3 Cal. 263; People v. Bartow, 6 Cow. 290; Freeland v. McCullough, 1 Den. 414, 43 Am. Dec. 685; Gldney v. Blake, 11 Johns. 54; Monell v. Colden, 13 Johns. 395, 7 Am. Dec. 390; Martin v. Williams, 13 Johns. 264; Mumford v. Fitzhugh, 18 Johns. 457; Wolf v. Luyster, 1 N. Y. Super. Ct. Rep. (1 Hall) 220. FED.—McCue v. Washington, City of, 3 Cr. C. C. 639, Fed. Cas. No. 8735; French v. Tunstall, Hempst. 204, Fed. Cas. No. 5104a; Vermont v. Society for Propag. of Gospel, 2 Paine 545, Fed. Cas. No. 16920; Stafford v. Western Union Tel. Co., 73 Fed. 274.

Badly pleaded and defective counts only should be attacked by the demurrer; a general demurrer to the whole will be bad.¹⁰ Thus, in covenant, where several breaches are assigned, some of which are sufficient and others not, the defendant should demur only to such as are bad; and if he demur to the whole declaration, judgment must be given against him.¹¹ So a demurrer to a whole complaint is bad if one of the plaintiffs may have judgment separately.¹² Where a complaint, filed to compel a partnership account, contained sufficient to call upon defendants for an accounting as to a particular branch of their business, but was in other respects inartificially drawn and insufficient, and a demurrer was put in to the whole complaint, it was held that the demurrer must be overruled.¹³ Where a demurrer is too general, it will be overruled.¹⁴ A general demurrer to a whole complaint which contains two counts setting forth two distinct causes of action is properly sustained, where neither of the counts states a cause of action, and it is not necessary that the demurrer in such case should refer to either of the counts separately;¹⁵ but where the complaint contains several counts, a general demurrer thereto on the ground that it fails to state facts sufficient to constitute a cause of action should be overruled, if any of the counts are sufficient,¹⁶ because a demurrer upon the general ground

¹⁰ *Douglass v. Satterlee*, 11 Johns. (N. Y.) 16.

¹¹ *Gill v. Stebbins*, 2 Paine 417, Fed. Cas. No. 5431.

¹² *Peabody v. Washington County Mut. Ins. Co.*, 20 Barb. (N. Y.) 339.

¹³ See cases in footnote 9, this section.

Carelessly drawn complaint which is sufficient to sustain judgment, a general demurrer thereto is properly overruled.—*Lawrence Nat. Bank v. Kowensky*, 105 Cal. 41, 38 Pac. 517.

¹⁴ *Young v. Pearson*, 1 Cal. 448; *Stoddard v. Treadwell*, 26 Cal. 294; *People v. Merrill*, 26 Cal. 361.

California Code requires that demurrer must specify the grounds upon which any of the objections to the complaint are taken; and that unless this is done it may be disregarded.—*Kerr's Cyc. Cal. Code Civ. Proc.*, 2d ed., § 431; *Consolidated Supp.* 1906-1913, p. 1455.

¹⁵ *Churchill v. Pacific Imp. Co.*, 96 Cal. 490, 31 Pac. 560.

¹⁶ *Pfister v. Wade*, 69 Cal. 133, 10 Pac. 369.

that the complaint does not state facts sufficient to constitute a cause of action is not sustainable, if the complaint states a cause of action in favor of any one of several plaintiffs.¹⁷ Upon a general demurrer to a complaint, where the facts necessary to constitute a cause of action are shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing by necessary implication, the demurrer will be overruled.¹⁸

Complaint not stating cause of action, being the ground on which the demurrer is interposed, it is not necessary to specify any further the ground of objection in those cases in which the complaint, though it contains two or more counts and separate causes of action, when all of the counts are bad;¹⁹ although it will be otherwise where one of the counts is sufficient.²⁰ Where a demurrer is to the whole bill, and is good as to a part, but bad as to part, it should be overruled;²¹ because a demurrer bad in part is bad in toto.²² Where the complaint counts upon two promises, the promise to pay costs and damages, and the promise to pay the value of the use and occupation of the premises, and the objections taken by demurrer to the whole complaint were: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the complaint is ambiguous, unintelligible, and uncertain, and under the first cause a multitude of supposed defects were specified, and under the last none were specified, the demurrer was properly overruled.²³

§ 884. WHEN DEMURRER WILL NOT LIE. In those cases in which the pleader makes the mistake of setting forth

¹⁷ O'Callaghan v. Bode, 84 Cal. 489, 495, 24 Pac. 269; Chevert v. Mechanics' Mill & Lumber Co., 4 Wash. 721, 31 Pac. 24.

¹⁸ Amistoy v. Electric Rapid Trs. Co., 95 Cal. 311, 30 Pac. 550.

¹⁹ See footnote 15, this section.

²⁰ Id.; footnotes 16 and 17.

²¹ People v. Morrill, 26 Cal. 360.

²² Ver Plank v. Caines, 1 Johns. Ch. (N. Y.) 57; Le Fort v. Delafield, 3 Edw. Ch. (N. Y.) 32; Kemberly v. Sells, 3 Johns. Ch. (N. Y.) 467; Thompson v. Newlin, 38 N. C. (3 Ired. Eq.) 388; Russell v. Lanier, 4 Tenn. (3 Hayw.) 388.

²³ Murdock v. Brooks, 26 Cal. 600.

the facts constituting a single cause of action in two separate statements, some facts in one and some in another, as constituting separate causes of action, this does not render the pleading demurrable.¹ It has been said a demurrer will not lie to a complaint for the defect of not separately stating two or more causes of action, they being such as might be united in one complaint if properly stated.² Where a complaint in but one count states facts constituting two or more causes of action, or the relief claimed is beyond that authorized by the facts, the remedy is by motion to strike out, not by demurrer.³ And in those cases in which some of the breaches in a count demurred to are good, a demurrer will not lie;⁴ though separate demurrers might be interposed to the several causes of action contained in the complaint.⁵

Surplusage and unnecessary matter, in a complaint, we have already seen, may be disregarded;⁶ it follows, therefore, that if the facts stated in a complaint constitute a valid and sufficient cause of action, though other and un-

¹ See *Lackey v. Vanderbilt*, 10 How. Pr. (N. Y.) 155; *Hillman v. Hillman*, 14 How. Pr. (N. Y.) 456.

² *Bernero v. South British & N. Ins. Co.*, 69 Cal. 386, 4 Pac. 382; *Ward v. Clay*, 82 Cal. 502, 23 Pac. 50, 227. COLO.—*Smith v. Carpenter*, 20 Colo. 39, 31 Pac. 789. N. Y.—*Dorman v. Kellam*, 4 Abb. Pr. 202, 14 How. Pr. 184; *Benedict v. Seymour*, 6 How. Pr. 298; *Gooding v. McAllister*, 9 How. Pr. 123; *Welles v. Webster*, 9 How. Pr. 251; *Robinson v. Judd*, 9 How. Pr. 378; *Peckham v. Smith*, 9 How. Pr. 436; *Moore v. Smith*, 10 How. Pr. 361; *Waller v. Raskin*, 12 How. Pr. 28; *Cheney v. Flisk*, 22 How. Pr. 236; *Harsen v. Bayard*, 12 N. Y. Super. Ct. Rep. (5 Duer) 656. OHIO—*Hartford Township v. Bennett*, 10 Ohio St. 441.

Defective averments or uncertainty in the complaint can not be urged on general demurrer.—*Ward v. Cay*, 82 Cal. 502, 23 Pac. 50, 227; *Carpenter v. Smith*, 20 Colo. 39, 31 Pac. 789.

In California, this is made a ground of demurrer by the procedural code.—See, post, § 956.

³ *Lord v. Vreeland*, 13 Abb. Pr. (N. Y.) 195, 24 How. Pr. 316; *Fickett v. Price*, 22 How. Pr. (N. Y.) 194.

⁴ *Hayden v. Sample*, 10 Mo. 215; *State v. Campbell*, 10 Mo. 724; *People v. Russell*, 4 Johns. (N. Y.) 570; *Martin v. Williams*, 17 Johns. (N. Y.) 330; *Glover v. Tuck*, 24 Wend. (N. Y.) 153.

⁵ *Ogdensburg Bank v. Paige*, 2 N. Y. Code R. 75.

⁶ See, ante, § 728.

necessary, immaterial, or redundant statements be contained in it, a demurrer will not lie;⁷ such objections are remedied by motion.⁸ In New York, a demurrer will not lie for irrelevancy or redundancy.⁹ It will not lie for argumentativeness.¹⁰ A mere clerical error in a complaint, e. g., the omission in a complaint against two de-

⁷ CAL.—Henke v. Eureka Endowment Assoc., 100 Cal. 429, 34 Pac. 1089; Bremner v. Lavitt, 109 Cal. 130, 41 Pac. 859. COLO.—Marix v. Stevens, 10 Colo. 261, 15 Pac. 350. IOWA—School District v. Pratt, 17 Iowa 16. MINN.—Loomis v. Youle, 1 Minn. 177. N. Y.—Bishop v. Edmiston, 16 Abb. Pr. 466, reversing 13 Abb. Pr. 346.

⁸ Kerr's Cyc. Cal. Code Civ. Proc., § 453. See: CAL.—Henke v. Eureka Endowment Assoc., 100 Cal. 429, 433, 34 Pac. 1809; Bremner v. Lavitt, 109 Cal. 130, 133, 41 Pac. 859. COLO.—Cramer v. Oppenstein, 16 Colo. 504, 27 Pac. 716. IOWA—Byington v. Robertson, 17 Iowa 562. N. Y.—People ex rel. Crane v. Ryder, 12 N. Y. 433; Cheshbrough v. New York & E. R. Co., 26 Barb. 9, 13 How. Pr. 557; Graham v. Camman, 12 N. Y. Super. Ct. Rep. (5 Duer) 697, 13 How. Pr. 360. WIS.—Morse v. Gilman, 16 Wis. 504.

As to what a demurrer to bill in equity is, and why it can not be sustained where the facts, as stated in the face of the pleading, entitle the plaintiff to relief, see: Grain v. Aldrich, 38 Cal. 514, 90 Am. Dec. 423; White v. Lyons, 42 Cal. 279; Carroll v. Carroll, 11 Barb. (N. Y.) 293, affirming 2 Edm. Sel. Cas. 158; Otis v. Spencer, 8 How. Pr. (N. Y.) 177; Union Mut. Ins. Co. v. Osgood, 8 N. Y. Super. Ct. Rep. (1 Duer) 707, 12 N. Y.

Leg. Obs. 85; Griffing v. Gibb, 67 U. S. (2 Black.) 519, 17 L. Ed. 353.

Motion to strike out is proper remedy to reach matter which is immaterial, redundant, or unnecessary, not demurrer, which does not reach the vice.—Henke v. Eureka Endowment Assoc., 100 Cal. 429, 433, 34 Pac. 1089; Bremner v. Lavitt, 109 Cal. 130, 133, 41 Pac. 859.

⁹ Smith v. Greenin, 3 N. Y. Code Rep. 206, 4 N. Y. Super. Ct. Rep. (2 Sandf.) 702; Seeley v. Engell, 13 N. Y. 542, reversing 17 Barb. 530; Roeder v. Ormsby, 13 Abb. Pr. (N. Y.) 334, 22 How. Pr. 270; Richards v. Edick, 17 Barb. (N. Y.) 260; Hammond v. Hudson River Iron & Machine Co., 20 Barb. (N. Y.) 386; Warren, Village of, v. Phillips, 30 Barb. (N. Y.) 646; Watson v. Husson, 8 N. Y. Super. Ct. Rep. (1 Duer) 242; affirmed, 14 N. Y. 60; Spies v. Accessory Transit Co., 12 N. Y. Super. Ct. Rep. (5 Duer) 662; Lee Bank v. Kitching, 20 N. Y. Super. Ct. Rep. (7 Bosw.) 664, 11 Abb. Pr. 435.

¹⁰ Judah v. Vincennes University, 23 Ind. 273; Zabriskie v. Smith, 13 N. Y. 322, 330, 64 Am. Dec. 551; Brown v. Richardson, 20 N. Y. 474, reversing 14 N. Y. Super. Ct. Rep. (1 Bosw.) 402; Marie v. Garrison, 83 N. Y. 14, reversing 45 N. Y. Super. Ct. Rep. (13 Jones & S.) 157; Milliken v. Western Union Tel. Co., 110 N. Y. 403, 1

fendants of the letter "s" in the word "defendants," will not sustain a demurrer;¹¹ and if the Christian name of one of the plaintiffs does not appear, it is no ground of demurrer.¹² If the complaint shows damage, it is not a ground of demurrer that it does not show the amount of damages; the amount of damages is never the subject of demurrer.¹³ A demurrer does not raise the objection that the complaint does not show a cause of action for so large a sum as that demanded; although it seems the demurrer in such case is not frivolous.¹⁴ In an action for the breach of a contract, the want of any averment of special damage can not be reached by a demurrer; such averment is only necessary where the right of action itself depends upon the special injury received, because on breach of contract an action lies, though no actual damage be sustained.¹⁵

Objection to deed of married woman that it was not signed and acknowledged as required by law, can not be raised by demurrer, where the complaint alleges that she

L. R. A. 281, 18 N. E. 251, reversing 53 N. Y. Super. Ct. Rep. (21 Jones & S.) 111; *Prindle v. Carruthers*, 15 N. Y. 431, 12 N. Y. Super. Ct. Rep. (5 Duer) 670, note, reversing 10 How. Pr. 33.

See, also, ante, §§ 805, 809.

¹¹ *Chamberlin v. Kaylor*, 2 E. D. Smith (N. Y.) 134.

¹² *Nelson v. Highland*, 13 Cal. 74; *Andrews v. Wynn*, 4 S. D. 40, 42, 54 N. W. 1047.

Initials sufficient when. — See *Meads v. Lasar*, 92 Cal. 221, 227, 28 Pac. 935.

—Amendment substituting full name for initial permitted when full name shown. — *Stever v. Brown*, 119 Mich. 196, 199, 77 N. W. 704.

¹³ *Peney v. Sleight*, 1 Wend. (N. Y.) 518; *Hecker v. De Groot*,

15 How. Pr. (N. Y.) 314.

Nominal damages shown by complaint for breach of contract, it is good against a general demurrer. — *Jacobs Sultan Co. v. Union Mercantile Co.*, 17 Mont. 61, 42 Pac. 109.

¹⁴ *Witherhead v. Allen*, 28 Barb. (N. Y.) 661; reversed on another point *42 N. Y. (3 Keyes) 562, 4 Abb. Ct. App. Dec. 628, 3 Transc. App. 258.

¹⁵ *McCarty v. Beach*, 10 Cal. 461, 464; *Moody v. Peirano*, 7 Cal. Unrep. 247, 84 Pac. 783; *Moody v. Peirano*, 4 Cal. App. 411, 415, 88 Pac. 380; *Jacobs Sultan Co. v. Union Mercantile Co.*, 17 Mont. 61, 42 Pac. 109; *Sunnyside Land Co. v. Willamette Bridge R. Co.*, 20 Ore. 544, 26 Pac. 835.

See, ante, § 843.

signed and delivered such deed.¹⁶ Nor can the objection be raised by demurrer that a bond signed by two has but one seal, for the party who has not actually signed and sealed the bond may specifically plead non est factum, under oath,¹⁷ although such plea would not avail under the California decisions. A demurrer to evidence is not a good plea to a bill in equity on the ground of its extending beyond the allegations contained in the bill.¹⁸ So the insertion of interrogatories in a complaint, after the mode of a bill of discovery, is not ground for demurrer.¹⁹ It can not be objected on demurrer to a declaration, alleging fraudulent misrepresentations, that the representations were made as a matter of opinion.²⁰ A demurrer to a bill which contains allegations of fraud and strong circumstances of equity must be overruled; in such case the defendant must answer to the fraud.²¹ Nor is the omission of pledges of prosecution in the complaint a ground for demurrer, they being mere matters of form.²² The want of affidavit to a plea is not, in Missouri, a ground for demurrer.²³ The objection to the want of verification of the complaint, where verification is required by statute, must be taken either before answer or with the answer.²⁴ It has been held that it should be taken by motion when the respondents appear.²⁵

§ 885. WHAT DEMURRER REACHES—DEFECTS IN PRAYER. A demurrer reaches those defects, objections and vices

¹⁶ Kays v. Phelan, 19 Cal. 128.

¹⁷ Smith v. Hart, 1 Mo. 273.

¹⁸ Blackburn v. Stannard, 5 Law Rep. 250, Fed. Cas. No. 1468.

¹⁹ Bank of British North America v. Suydam, 1 N. Y. Code Rep. (N. S.) 325, 6 How. Pr. 379.

²⁰ Whitton v. Goddard, 36 Vt. 730.

²¹ Burnley v. Jeffersonville, Town of, 3 McL. 336, Fed. Cas. No. 2181.

²² Baker v. Phillips, 4 Johns. (N. Y.) 190.

²³ Parker v. Simpson, 1 Mo. 539.

²⁴ Greenfield v. Gunnell, The Steamer, 6 Cal. 67; Kohlman v. Wright, 6 Cal. 231; Pence v. Durbin, 1 Idaho 550, 552; Moore v. Hupp, 17 Idaho 232, 245, 105 Pac. 209, 213; State v. Chadwick, 10 Ore. 423, 427.

²⁵ Woodworth v. Edwards, 3 Woodb. & M. 120, Fed. Cas. No. 18014.

enumerated in the statute,¹ only, and not merely formal defects which do not go to the sufficiency of the statement of the cause of action; its office is to deny the legal sufficiency of the complaint, granting that all its allegations are true, it does not state a cause of action.² The prayer for the relief to which a pleader believes himself entitled under the facts, is no part of the plaintiff's statement of his cause of action in the complaint;³ and objections to the prayer of a complaint can not be taken by demurrer.⁴ If the specific relief asked can not be granted, such relief as the case stated in the bill authorizes may be had under the clause in the prayer for general relief, and even in the absence of such clause, when an answer is filed. The facts in the complaint, and not the prayer, settle the relief to be granted.⁵ As a matter of fact, the entire omission of any prayer would not subject the complaint or petition to demurrer.⁶ Nor will demurrer lie to the demand for more relief than the plaintiff is entitled to.⁷ If the com-

¹ See, post, §§ 912 et seq.

² See, ante, § 872.

³ Although physically a part of the complaint, the prayer is no portion of the statement of facts required to constitute a cause of action.—*Fox v. Graves*, 46 Neb. 812, 65 N. W. 887.

⁴ Demurrer to prayer of complaint, regardless of the relief demanded therein, will not lie.—*Rollins v. Forbes*, 10 Cal. 299; *De Leon v. Higuera*, 15 Cal. 494; *Althof v. Conheim*, 38 Cal. 234, 99 Am. Dec. 364; *Bailey v. Dale*, 71 Cal. 34, 37, 11 Pac. 804; *De Leonis v. Hammel*, 1 Cal. App. 394, 82 Pac. 351; *Oliver v. Blair*, 2 Cal. Unrep. 564, 8 Pac. 612.

⁵ *Rollins v. Forbes*, 10 Cal. 299; *People v. Morrill*, 26 Cal. 336; *Althof v. Conheim*, 38 Cal. 234, 99 Am. Dec. 364; *Stewart v. Hutchinson*, 29 How. Pr. (N. Y.) 181;

Garner v. Thom, 56 How. Pr. (N. Y.) 452; *Mackey v. Auer*, 8 Hun (N. Y.) 180; *Walker v. Spencer*, 45 N. Y. Super. Ct. Rep. (13 Jones & S.) 71; *Garner v. Harmony Mills*, 45 N. Y. Super. Ct. Rep. (13 Jones & S.) 148, 6 Abb. N. C. 212.

⁶ *Fox v. Graves*, 46 Neb. 812, 65 N. W. 887.

⁷ *Rollins v. Forbes*, 10 Cal. 299; *Emery v. Pease*, 20 N. Y. 62; *Stuyvesant v. New York, City of*, 11 Pal. Ch. (N. Y.) 415; *Moran v. Anderson*, 1 Abb. Pr. 288; *Woodgate v. Fleet*, 9 Abb. Pr. (N. Y.) 222; *Bishop v. Edmiston*, 16 Abb. Pr. 466; *Price v. Brown*, 10 Abb. N. C. (N. Y.) 67, 60 How. Pr. 511; *Moses v. Walker*, 2 Hilt. 536; *Hecker v. De Groot*, 15 How. Pr. (N. Y.) 314; *Andrews v. Shaffer*, 12 How. Pr. (N. Y.) 441, 443; *Beale v. Hayes*, 5 N. Y. Super. Ct.

plaint shows that the plaintiff has a cause of action, and that he is entitled to some relief, the question as to what kind, or how much relief should be granted to him, can not be made on demurrer.⁸ In those cases in which the complaint states facts which entitled the plaintiff to relief, whether legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action.⁹ But if the complaint does not state facts sufficient to enable the plaintiff to recover any part of the relief demanded, it is demurrable, though he would from the facts be entitled to other relief.¹⁰ A demurrer to a complaint, on the ground that it seeks a remedy at law, and also seeks for equitable relief, is bad.¹¹ A demurrer to a bill in equity alleging that the relief can be had at law, will not lie where the bill charges fraud, and prays relief against a judgment at law, and from a sale under it.¹²

§ 886. KINDS OF DEMURRERS — IN GENERAL. Demurrers are divided into two classes, determined by the matter contained in the objection taken to the pleading against which it is directed, and are either (1) general,¹ or (2) special.² Each of these classes have their separate functions and merits. In those instances in which the complaint, or other pleading attacked, is clearly insufficient to constitute a cause of action or defense, or clearly fails to set out facts entitling the plaintiff to equitable relief,

Rep. (5 Sandf.) 640; Howard v. Seattle Nat. Bank, 10 Wash. 280, 38 Pac. 1040, 39 Pac. 100.

⁸ Poett v. Stearns, 28 Cal. 226.

⁹ Marriott v. Clise, 12 Cal. 561, 21 Pac. 909.

¹⁰ Walton v. Walton, 32 Barb. (N. Y.) 203, 11 Abb. Pr. 231, 20 How. Pr. 437; reversed on another point, *40 N. Y. (1 Keyes) 15.

¹¹ Gates v. Kleff, 7 Cal. 125;

Marius v. Bicknell, 10 Cal. 224; Weaver v. Conger, 10 Cal. 237; Rollins v. Forbes, 10 Cal. 300; Natoma Water & Min. Co. v. Clarkin, 14 Cal. 543; More v. Massini, 32 Cal. 594, 596; Hughes v. Dunlap, 91 Cal. 385, 390, 27 Pac. 642.

¹² Shelton v. Tiffin, 47 U. S. (6 How.) 163, 12 L. Ed. 387.

¹ As to general demurrers, see, post, § 887.

² As to special demurrers, see, post, § 889.

a general demurrer is proper and sufficient; but in all other instances a special demurrer should be interposed. A general demurrer goes to defects of substance,³ and a special demurrer to defects of form,⁴ of the complaint or other pleading assailed.

California procedural code requires a demurrer to a complaint to distinctly specify the grounds upon which the objections made to the pleading are taken; and provides that if the particular grounds of objection are not so specified in the demurrer, it may be disregarded.⁵ The effect of this provision of the code upon a general demurrer will be discussed in the following section.

§ 887. — GENERAL DEMURRER. A general demurrer is one that goes to the merits of the cause sought to be stated in the pleading thus challenged, being drawn in general terms, without specifying any particular grounds why the pleading is insufficient to state a cause of action or defense, or to show any equity, and without any formality other than that required by the local practice or rule of court.¹ A general demurrer goes to the substance only, and raises the question of law as to whether a cause of action or defense is stated, or whether the showing is sufficient to entitle the party to relief in equity;² and, where the objection is well taken, is sufficient on the matter of the pleading.³

We have already seen that general demurrer goes to the defects of substance, only; a special demurrer to the

³ *Darcy v. Lake*, 46 Miss. 109, 117; *Commonwealth v. Cross Cut R. Co.*, 53 Pa. St. 62.

⁴ *Id.*

⁵ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 434.

¹ ALA.—*McGuire v. Van Pelt*, 55 Ala. 344, 349. MICH.—*Shaw v. Chase*, 77 Mich. 436, 439, 43 N. W. 883; *Taylor v. Taylor*, 87 Mich. 64.

¹ Code Pl. and Pr.—80

68, 49 N. W. 519, 521. MISS.—*Darcy v. Lake*, 46 Miss. 109, 117. VA.—*Reid v. Field*, 83 Va. 26, 1 S. E. 395. FED.—*Christmas v. Russell*, 72 U. S. (5 Wall.) 290, 303, 18 L. Ed. 475.

² *Darr v. Berquist*, 63 Neb. 713, 89 N. W. 256.

³ *Reid v. Field*, 83 Va. 26, 1 S. E. 395.

defects of form.⁴ A general demurrer, assigning reasons why the plaintiff should not recover, must be considered and treated as a special demurrer.⁵ The requirement of the California procedural code that a demurrer to a complaint shall distinctly state the grounds of the objection, has already been pointed out;⁶ but this provision, as we shall hereafter see, does not in fact change the force and effect of a general demurrer, or the mode of framing it, since, under another section of the same code,⁷ it is provided that a failure to demur to the jurisdiction, or upon the ground that the complaint does not state facts sufficient to constitute a cause of action, does not waive either objection. This must be so, independently of this provision, since, if the court has not jurisdiction, it can not render a valid judgment, nor could a judgment be sustained upon the record if it did not disclose facts to sustain the judgment. On demurrer, the court should not pay any attention to forms, if it can find in the complaint any allegations which, under any view of them, may give the plaintiff a right to recover.⁸ The same distinction between insufficient facts and an insufficient statement of facts, which prevails when it is considered whether the complaint supports the judgment, should prevail upon general demurrer.⁹ If the complaint contains the elements of a cause of action, however inartificially it may be stated; and if, on analyzing the facts disclosed, the whole or any part of them can be resolved into a cause of action, the demurrer should be overruled.¹⁰ If the declaration does not set forth a proper case, and in a correct

⁴ See, ante, § 886, footnotes 3 and 4.

⁵ *Tyler v. Hand*, 46 U. S. (5 How.) 573, 12 L. Ed. 824.

⁶ See, ante, § 886.

⁷ See *Kerr's Cyc. Cal. Code Civ. Proc.*, § 434.

⁸ *Butterworth v. O'Brien*, 39

Barb. (N. Y.) 192, 24 *How. Pr.* 438; *Wilder v. McCormick*, 2 *Blatchf.* 31, *Fed. Cas. No.* 17650.

⁹ *Amestoy v. Electric Rapid Transit Co.*, 95 *Cal.* 311, 30 *Pac.* 550.

¹⁰ *Id.*; *People v. New York, City of*, 28 *Barb. (N. Y.)* 240, 8 *Abb. Pr.* 7.

form, the defendant may avail himself of these defects on demurrer; but the want of proper averments in the declaration can not be made the ground of a nonsuit.¹¹ For defects in mere matters of form in a pleading, the adverse party should interpose a special demurrer; a general demurrer will not in general reach them;¹² although a contrary doctrine is held.¹³ But these questions are regulated by the decisions of the courts in the several states and under the statutes in force. A general demurrer to a plea of fraud in obtaining the judgment in the suit is insufficient where the objection intended to be raised is that the plea does not state the particulars of the fraud relied upon; this being matter of form merely.¹⁴

In California, it is held that an averment in a complaint that the defendant unlawfully took personal property, is a mere averment of law, and an averment that he fraudulently took it, without stating the facts which constitute the fraud, is not a statement of an issuable fact;¹⁵ the same doctrine prevails in Utah,¹⁶ and perhaps elsewhere.

¹¹ *Bas v. Steel*, 1 Pet. C. C. 406, Fed. Cas. No. 1087.

¹² *Tehama County v. Bryan*, 68 Cal. 57, 8 Pac. 613; *Schmidt v. Market Street & W. G. R. Co.*, 90 Cal. 37, 27 Pac. 61; *Kimball v. Lyon*, 19 Colo. 266, 35 Pac. 44; *Childress v. Emery*, 21 U. S. (8 Wheat.) 642, 5 L. Ed. 705; *Christmas v. Russell*, 72 U. S. (5 Wall.) 290, 18 L. Ed. 475.

¹³ *Lockington v. Smith*, 1 Pet. C. C. 466, Fed. Cas. No. 8448.

¹⁴ *Christmas v. Russell*, 72 U. S. (5 Wall.) 290, 18 L. Ed. 475.

¹⁵ *Kidder v. Macy*, 7 Cal. 26; *Harris v. Taylor*, 15 Cal. 348; *Meeker v. Harris*, 19 Cal. 289, 79 Am. Dec. 215; *Triscony v. Orr*, 49

Cal. 612; *Payne v. Elliott*, 54 Cal. 340, 54 Am. Rep. 80; *Pehrson v. Hewitt*, 79 Cal. 594, 598, 21 Pac. 950; *Cosgrove v. Fisk*, 90 Cal. 75, 27 Pac. 56.

¹⁶ *Selz v. Tucker*, 10 Utah 132, 37 Pac. 249. A case in which it was claimed the cause of action was accelerated by fraud, without setting out the acts constituting the fraud.

Fraud accelerating maturity of action claimed, the complaint must set out the acts claimed to constitute the fraud.—See: *Woods v. Tanquary*, 3 Colo. App. 215, 34 Pac. 737; *Heard v. Richey*, 112 Mo. 516, 20 S. W. 799; *Selz v. Tucker*, 10 Utah 132, 37 Pac. 249; *Cox v. Dawson*, 2 Wash. 381, 26 Pac. 973.

§ 888. ——— BREACH OF CONTRACT — NONPAYMENT. A complaint which entirely fails to state a breach of the contract sued upon, or to allege the nonpayment of money sought to be recovered, states no cause of action, and may be assailed by general demurrer. But if there is not an entire failure to state the fact of breach or nonpayment, and the averment is simply uncertain and defective, the defect can be reached only by special demurrer particularly designating the specific point at which it is aimed.¹ In an action to recover money upon a contract, the failure to pay constitutes the breach, and must be alleged. And an allegation that a specified amount is “now due and owing” to the plaintiff is a mere conclusion of law, and is insufficient as an averment of the fact of nonpayment.²

§ 889. ——— SPECIAL DEMURRER—COMMON-LAW RULE. A special demurrer is one pointing out the particular defects in the complaint or other pleading to which objection is taken, and specifying the grounds of the objection,¹ and in this is distinguished from a general demurrer;² it does not go to the merits of the cause, and is not an “issuable plea.”³ We have already seen that the office of a special demurrer is to assail the defects in the form of statement or the structure of the pleading challenged,⁴ and for that reason is required to point out specifically the defects to which objection is taken.⁵ Where a complaint, or other pleading, fails to state a fact essential to the cause of action or of defense, the defect may be taken

¹ Grant v. Sheerin, 84 Cal. 197, 23 Pac. 1094.

² Ryan v. Holliday, 110 Cal. 335, 42 Pac. 891; Richards v. Lake View Land Co., 115 Cal. 642, 47 Pac. 683.

³ Drais v. Hogan, 50 Cal. 127; Darcy v. Lake, 46 Miss. 109, 117; Christmas v. Russell, 72 U. S. (5 Wall.) 290, 303, 18 L. Ed. 475.

² Revelle, The Steamboat, v. Case, 9 Mo. 498; Jackson v. Rundlet, 1 Woodb. & M. 381, Fed. Cas. No. 7145.

³ Welsh v. Blackwell, 14 N. J. L. (2 J. S. Gr.) 344, 346.

⁴ See, ante, § 886, footnote 4; Martin v. Bartow Iron Works, 35 Ga. 320, Fed. Cas. No. 9157.

⁵ Shaw v. Chase, 77 Mich. 436, 439, 43 N. W. 883.

advantage of by a general demurrer;⁶ but where the pleading contains all the essential facts, yet states them defectively or improperly, the defect can be reached by a special demurrer only, particularly designating the specific point at which it is aimed;⁷ and where this is not done in the demurrer it may be, and usually is, disregarded.⁸ A special demurrer to one of two or more counts or causes of action may be sustained, and judgment be entered on the other against defendant;⁹ but a demurrer for a misjoinder of counts must be to the whole declaration,¹⁰ and a cause of demurrer must be specially assigned.¹¹ A special demurrer must specify the grounds upon which any of the objections to the complaint are taken;¹² and if it omit such specifications it may be disregarded.¹³ This must be done in all cases, except: (1) When objection is raised to the jurisdiction of the court; and, (2) when the ground is that the complaint does not state facts sufficient to constitute a cause of action.¹⁴

⁶ *Dixon v. Cardozo*, 106 Cal. 506, sub nom. *Dixon v. Gries*, 39 Pac. 857; *Wilkenson Coal & Coke Co. v. Driver*, 9 Wash. 177, 37 Pac. 307.

Complaint showing cause of action in some one is not sufficient; it must show the cause of action in the plaintiff, or a general demurrer will lie. In the case of an insane person, the complaint should be in the name of the incompetent, by his guardian, concerning his property and property rights, and if not so prosecuted general demurrer lies.—See: *Fox v. Minor*, 32 Cal. 116, 91 Am. Dec. 566; *Wilson v. Wilson*, 36 Cal. 451, 95 Am. Dec. 194; *Karr v. Parks*, 44 Cal. 48; *Emeric v. Alvarado*, 64 Cal. 529, 593, 2 Pac. 418, 3 Pac. 105; *Justice v. Ott*, 87 Cal. 530, 25 Pac. 691; *O'Shea v. Wilkinson*, 95 Cal. 454, 30 Pac. 588; *Dixon v. Cardozo*,

106 Cal. 506, 507, sub nom. *Dixon v. Gries*, 39 Pac. 857.

⁷ *Harmish v. Bramer*, 71 Cal. 155, 11 Pac. 888; *Jacobs Sultan Co. v. Union Mercantile Co.*, 17 Mont. 61, 42 Pac. 109.

⁸ *Henderson v. Johns*, 13 Colo. 280, 22 Pac. 461; *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703.

⁹ *Barber v. Cazalis*, 30 Cal. 92.

¹⁰ *Ferris v. North American Fire Ins. Co.*, 1 Hill (N. Y.) 71.

¹¹ *Owsley v. Montgomery & W. P. R. Co.*, 37 Ala. 560.

¹² *Kerr's Cyc. Cal. Code Civ. Proc.*, 2d ed., § 431, Consolidated Supp. 1906-1913, p. 1455; *Harper v. Chamberlin*, 11 Abb. Pr. (N. Y.) 234.

¹³ *Kerr's Cyc. Cal. Code Civ. Proc.*, 2d ed., § 431, Consolidated Supp. 1906-1913, p. 1455.

¹⁴ *Kent v. Snyder*, 30 Cal. 666; *Nash v. Smith*, 6 Conn. 421; *Haire*

At common law, and in the old equity practice, a special demurrer should point out specifically by paragraph, page, or folio, or other mode of reference, the parts of the bill to which it is intended to apply.¹⁵ Special demurrers, as known to the common-law procedure and the old equity practice, have no place in procedural code pleading and practice.¹⁶

§ 890. TESTING COMPLAINT BY DEMURRER — IN GENERAL. The sufficiency of a pleading is properly tested by demurrer.¹ On demurrer, the pleadings only can be considered.² The sufficiency of the facts in a pleading, on a demurrer thereto, can not be strengthened or weakened, added to or diminished by facts stated in other pleadings subsequently filed, or by the facts proven on the trial.³ When a demurrer is interposed, the sufficiency of any antecedent pleading to which the pleading demurred to relates may be called in question.⁴ A demurrer searches the entire record, and judgment should go against the

v. Baker, 5 N. Y. 357; Durkee v. Saratoga R. Co., 2 N. Y. Code Rep. 145, 4 How. Pr. 226; Anibal v. Hunter, 1 N. Y. Code Rep. (N. S.) 403, 6 How. Pr. 255; Viburt v. Frost, 3 Abb. Pr. (N. Y.) 119, 120; Johnson v. Wetmore, 12 Barb. (N. Y.) 433; Skinner v. Stuart, 39 Barb. (N. Y.) 206, reversing 13 Abb. Pr. 457; Hinds v. Tweddle, 7 How. Pr. (N. Y.) 278; Hobart v. Frost, 12 N. Y. Super. Ct. Rep. (5 Duer) 672.

¹⁵ Kuypers v. Reformed Dutch Church, 6 Pal. Ch. (N. Y.) 570; Jarvis v. Palmer, 11 Pal. Ch. (N. Y.) 650; Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640; Robinson v. Thompson, 2 Ves. & B. 118; Weatherhead v. Blackburn, 2 Ves. & B. 121; Dovensher v. Neweham, 2 Sch. & Lef. 199.

See, also, Story's Eq. Pl. (9th ed.) § 457.

¹⁶ See: Marie v. Garrison, 83 N. Y. 14, reversing 45 N. Y. Super. Ct. Rep. (13 Jones & S.) 157; Bottom v. Chamberlain, 21 Misc. (N. Y.) 556, 47 N. Y. Supp. 733.

¹ Victorian, The, 24 Ore. 121, 41 Am. St. Rep. 838, 32 Pac. 1040.

² Magdenburg v. Wihlein, 53 Wis. 165, 10 N. W. 363; Northwestern Iron Co. v. Central Trust Co., 90 Wis. 570, 580, 63 N. W. 752, 64 N. W. 323.

See, also, discussion and authorities, ante, §§ 872, 874.

³ Cole v. Gray, 139 Ind. 396, 399, 38 N. E. 856; Elwood Natural Gas & Oil Co. v. Baker, 13 Ind. App. 576, 41 N. E. 1063.

⁴ Knight v. Lawrence, 19 Colo. 425, 36 Pac. 242.

party whose pleading was first defective in substance.⁵ Although a party may be required, on motion, to conform his statements in pleadings to the rules of good pleading, yet, it has been said, as against a demurrer, evidentiary facts, and even inferences from averments amounting to mere conclusions of law, will be considered in his favor,⁶ although the contrary seems to be held by the weight of decision.⁷ Where a demurrer has been sustained to one of the counts in a declaration, it is error to permit such count to be read to the jury, or to receive evidence thereupon.⁸ A patent manifestly invalid upon its face may be so declared on demurrer to the bill.⁹ But this power should be exercised with the utmost caution and only in the plainest cases, and if there is any doubt it should be resolved in favor of the patent.¹⁰ The question of the propriety of issuing a writ of ne exeat can not be raised by demurrer.¹¹

§ 891. — SUFFICIENCY AND EFFECT OF DEMURRER. Where the facts stated in a complaint entitle the plaintiff to any relief, a demurrer for want of sufficient facts should be overruled.¹ A joint demurrer by two or more defendants to a complaint is properly overruled if such complaint is good as against either of them;² hence, a demurrer by all of several defendants reciting that they

⁵ Oakley v. Valley County, 40 Neb. 900, 59 N. W. 368; Hawthorn v. State, 45 Neb. 871, 64 N. W. 359.

⁶ See: Santa Barbara, City of, v. Eldred, 108 Cal. 294, 41 Pac. 410; Chambers v. Hoover, 3 Wash. Tr. 107, 13 Pac. 466.

⁷ See discussion, ante, § 827, and authorities in footnotes 8-10; also, post, § 891.

⁸ Luna v. Mohr, 3 N. M. 56, 1 Pac. 860.

⁹ Button Fastener Co. v. Schlochtmeier, 69 Fed. 592.

¹⁰ New York Belting & P. Co.

v. New Jersey Car Spring & R. Co., 137 U. S. 445, 34 L. Ed. 741, 11 Super. Ct. Rep. 193; Davock v. Chicago & N. W. R. Co., 69 Fed. 468; Covert v. Travers, 70 Fed. 788.

¹¹ Shainwald v. Lewis, 69 Fed. 487.

¹ Bloomfield R. Co. v. Van Slick, 107 Ind. 480, 8 N. E. 269; United States Saving Fund & Invest. Co. v. Harris, 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451; Aldrich v. Bolce, 56 Kan. 170, 42 Pac. 695.

² Asevado v. Orr, 100 Cal. 293,

demur jointly as well as separately and severally to the "first, second and third paragraphs of the complaint," will be treated as a general demurrer by all the defendants, and is bad if the complaint is good against any of them.³ Under Florida procedure, the failure of the plaintiff to attach a copy of his cause of action to his declaration can not be taken advantage of by demurrer, and the defendant's proper remedy is to refuse to plead until such cause of action is filed.⁴ The proper remedy, under Maryland practice, where the paragraphs of a bill in equity are wrongly numbered, and more than one subject-matter are embraced in a single paragraph, is by motion in the nature of a *ne recipiatur*, and not by demurrer.⁵ A complaint setting up two causes of action for breach of contract is not rendered demurrable because they are not separately stated and numbered.⁶ In an action upon a contract, which recognizes the right of the parties to make assignments, a complaint setting up the contract is not demurrable because the action is by and against different parties than those named in the contract, when the complaint shows their interest through assignment.⁷ The objection that the averments of a complaint are made on information and belief is not a ground of demurrer, either general or special,⁸ that cause of objection not falling within any of the grounds of demurrer specified in the statute.⁹

34 Pac. 777; *Rogers v. Schulenburg*, 101 Cal. 281, 284, 43 Pac. 899.

See, also, *Pomeroy's Remedies and Remedial Rights*, § 577.

³ *Armstrong v. Dunn*, 143 Ind. 433, 41 N. E. 540.

⁴ *Martyn v. Arnold*, 36 Fla. 446, 18 So. 791.

⁵ *Chew v. Glenn*, 82 Md. 370, 33 Atl. 722.

⁶ *Nichols v. Drew*, 94 N. Y. 22; *Zrskowski v. Mach*, 15 Misc. (N. Y.) 234, 36 N. Y. Supp. 421.

⁷ *Van Horne v. Watrous*, 10 Wash. 525, 39 Pac. 136.

⁸ *Carpenter v. Smith*, 20 Colo. 39, 36 Pac. 789; *Jones v. Pearl Min. Co.*, 20 Colo. 417, 38 Pac. 700; *Marie v. Garrison*, 83 N. Y. 14, 23, reversing 45 N. Y. Super. Ct. Rep. (13 Jones & S.) 157; *Thackara v. Reid*, 1 Utah 238.

⁹ *Id.*; *Hentsch v. Porter*, 10 Cal. 555; *Bernero v. South British & N. Ins. Co.*, 65 Cal. 386, 4 Pac. 382; *Kyle v. Craig*, 125 Cal. 107, 111, 57

In California, error in sustaining a demurrer to a complaint on the ground of the misjoinder of several causes of action is held to be waived, if the plaintiff subsequently files an amended complaint, in which he unites and pleads anew in one count all the causes of action which had been pleaded in the original complaint,¹⁰ but the rule seems to be otherwise in other jurisdictions.¹¹ A stipulation that a demurrer to the complaint may be overruled, and the defendant allowed to answer within a certain time, does not estop the defendant from relying at any future stage of the case on the alleged failure of the complaint to state sufficient facts to constitute a cause of action.¹²

§ 892. — AVERMENTS IN PLEADING ALONE CONSIDERED. We have already seen that there is authority to the effect that, on demurrer, evidentiary facts, and even inferences from averments amounting to mere conclusions of law will be considered in support of the pleading,¹ but that the better opinion and the weight of decision is to the effect that in determining the sufficiency of a complaint the averments therein can alone be considered. And the rule in some jurisdictions is, that a complaint which does not state a cause of action by its averments, without reference to exhibits, is bad on demurrer,² although a different rule prevails elsewhere.³ The claim after judg-

Pac. 791; *Mader v. Plano Mfg. Co.*, 17 S. D. 556, 97 N. W. 845.

See *Pomeroy's Remedies and Remedial Rights*, § 548.

Grounds of demurrer are those specified in the code, only.—*Hentsch v. Porter*, 10 Cal. 555, 558; *Kyle v. Craig*, 125 Cal. 107, 111, 57 Pac. 791; *Mader v. Plano Mfg. Co.*, 17 S. D. 556, 97 N. W. 845.

¹⁰ *Hagely v. Hagely*, 68 Cal. 348, 9 Pac. 305; *Loveland v. Garner*, 71 Cal. 541, 12 Pac. 616.

¹¹ See: *Mutual Reserve Fund Life Assoc. v. Bradbury*, 53 N. J. Eq. 643, 33 Atl. 960; *Wood v. Mastick*, 2 Wash. Tr. 64, 3 Pac. 612.

¹² *Hitchcock v. Caruthers*, 82 Cal. 523, 23 Pac. 48.

¹ See, ante, § 890, footnotes 6 and 7.

² *Bowling v. McFarland*, 38 Mo. 465; *Larimore v. Wells*, 29 Ohio St. 13; *Aultman & Co. v. Siglinger*, 2 S. D. 442, 50 N. W. 911.

³ *Taylor v. MacLea*, 19 N. Y.

ment that a complaint is insufficient can only be sustained on the ground that the facts contained therein, even if well stated, constitute no cause of action,⁴ and the objection may be taken at any time.⁵ The objection that the allegata and probata do not agree can not be urged after verdict rendered, if the complaint is sufficient to support the judgment.⁶

§ 893. — ACTION AGAINST GARNISHEE. Allegations in a complaint against a garnishee, in an action by a judgment creditor, authorized in proceedings supplementary to execution against the judgment debtor, that the assignor of the plaintiff "recovered a judgment" in the Superior Court, "which judgment was duly entered," etc., and that the order authorizing the suit was "duly made," are sufficient as against a general demurrer.¹

§ 894. — ACTION FOR RECOVERY OF PERSONAL PROPERTY. Under the Code of South Dakota,¹ the action to recover personal property takes the place of, and is a substitute for, both the former actions of replevin and detinue. The unlawful detention is the gist of the action, and it is immaterial how the defendant acquired the possession, so far as the action to recover the property is concerned. The principal issues in the action are the plaintiff's right to possession, the defendant's unlawful detention, the value of the property, and damages for its detention.²

Civ. Proc. Rep. 429, 11 N. Y. Supp. 640.

⁴ Bethel v. Woodworth, 11 Ohio St. 396.

⁵ Holly v. Heiskell, 112 Cal. 174, 44 Pac. 466.

⁶ Horn v. Hamilton, 89 Cal. 276, 26 Pac. 833; United States v. Small, 3 Wash. Tr. 478, 17 Pac. 739.

¹ High v. Bank of Commerce, 95 Cal. 386, 29 Am. St. Rep. 121, 30 Pac. 556. See: Bull v. Houghton, 65 Cal. 422, 4 Pac. 529; Dore v.

Thornburgh, 90 Cal. 64, 66, 25 Am. St. Rep. 100, 27 Pac. 30.

As to method of pleading judgment or order, and sufficiency of, see, ante, § 724.

¹ S. D. Code of Civil Procedure, §§ 4972-4983.

² Willis v. DeWitt, 3 S. D. 281, 52 N. W. 1090. See Oleson v. Merrill, 20 Wis. 462.

Wrongful detention alleged plaintiff may prove on the trial a wrongful taking of the property, a demand and refusal, or any of the

In California the complaint must show the ultimate fact that the plaintiff was the owner or entitled to the possession at the time of the commencement of the action, or it will be vulnerable to demurrer; it is not sufficient to aver that he was the owner or entitled to the possession at some time prior to the commencement of the action.³

§ 895. — ACTION FOR REMOVING FIXTURES. An action for damages will lie in favor of a mortgagee whose security is impaired by the removal of fixtures permanently attached to the realty, against the person or persons removing them. And a complaint against the mortgagor and another defendant claiming to be a purchaser of the fixtures, alleging that they removed such fixtures, well knowing that they would thereby impair and render insufficient the plaintiff's security, and that it was thereby rendered insufficient; that the mortgagor is insolvent, and that after foreclosure of the mortgage, an unsatisfied personal judgment remains for a deficiency, sufficiently states a cause of action.¹

§ 896. — ACTION TO ANNUL HOMESTEAD. A complaint, in an action to annul an order setting apart a homestead to the widow of a deceased person out of his estate, which alleges that the property set apart was the separate property of the deceased, and that the widow, defendant in the action, knowing that fact, and for the purpose of deceiving the court, falsely alleged and falsely swore that

facts that render a demand and refusal unnecessary, when the original taking was lawful. Proof of any facts showing that the property was wrongfully detained at the commencement of the action will justify the allegations of the complaint, and entitle plaintiff to recover.—Mr. Chief Justice Dixon in *Oleson v. Merrill*, 20 Wis. 462.

³ *Masterson v. Clark*, 5 Cal.

Unrep. 146, 41 Pac. 796; *Williams v. Ashe*, 111 Cal. 180, 43 Pac. 595; *Afflerbach v. McGovern*, 79 Cal. 268, 21 Pac. 837; *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750; *Holly v. Heiskell*, 112 Cal. 174, 175, 44 Pac. 466.

See, also, discussion and authorities, ante, § 615.

¹ *Lavenson v. Standard Soap Co.*, 80 Cal. 245; 13 Am. St. Rep. 147, 22 Pac. 184.

the property was community property, whereby the court was misled and deceived, and induced to make the order, is vulnerable to a demurrer on the ground that it does not state facts sufficient to constitute a cause of action.¹

§ 897. — ACTION TO CONTEST RIGHT TO PURCHASE STATE LANDS. A complaint in this action must allege the facts, so that the court may see whether the application was made in due form. Each party is an actor, and must allege and prove all the facts upon which he relies as showing his right to become a purchaser, and the steps he has taken to avail himself of and secure his right to make the purchase.¹ But this does not change the rule of Code pleading that material allegations which are not denied must be taken as true.² An allegation that the plaintiff filed his "affidavit and application in due form" is the statement of a mere conclusion, and is insufficient.³ The plaintiff in such action, not having shown a right to purchase in himself, is not entitled to recover because of the insufficiency of the allegations or proof of the defendant.⁴ The burden rests upon either party to establish

¹ Fealey v. Fealey, 104 Cal. 354, 359, 43 Am. St. Rep. 111, 38 Pac. 49.

Fraud upon the court in the matter of a false affidavit for publication of summons in which he swore he had a good cause of action, when he knew the contrary to be the truth, and when the judgment resting upon it is unconscionable, a different case is presented, and equity will afford relief.—Dunlap v. Steere, 92 Cal. 344, 27 Am. St. Rep. 143, 16 L. R. A. 361, 28 Pac. 563; Pico v. Cohn, 91 Cal. 129, 25 Am. St. Rep. 159, 13 L. R. A. 336, 25 Pac. 970, 27 Pac. 537; United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93, affirming 4 Sawy. 42, Fed. Cas. No. 15121.

Question of title litigated necessarily in the action setting aside the homestead, and is res adjudicata; the plaintiff can not attack that judgment in a collateral proceeding, or bring into litigation the same matters involved and settled in the former judgment setting aside the homestead.—Griffith's Estate, In re, 84 Cal. 107, 113, 24 Pac. 381, 25 Pac. 528.

¹ Cushing v. Keslar, 68 Cal. 473, 9 Pac. 659.

² Prentice v. Miller, 82 Cal. 570, 23 Pac. 189.

³ McEntee v. Cook, 76 Cal. 187, 18 Pac. 258.

⁴ Manley v. Cunningham, 72 Cal. 236, 13 Pac. 622.

As to sufficiency of complaint in such an action, see, further, Mc-

his own right.⁵ Where, in an action against a pre-emption claimant, the plaintiff claims priority of right over the defendant to become the purchaser from the government, and to receive a patent for the land in controversy, under a pre-emption claim, it is not enough to allege he had or has such right, as that allegation is a mere conclusion of law, but the plaintiff must show the state of facts conferring such right, and also that he took the legal steps to avail himself thereof.⁶

§ 898. — ACTION TO CONTEST RIGHT TO MINING CLAIM. In the case of a contest of a mining claim, in an action to determine adverse claims preliminary to the issuance of a patent for the claim, the complaint must contain an allegation of citizenship on the part of the contestant, or an equivalent allegation, in order to be sufficient on demurrer;¹ but in an ordinary civil action for injuries to a mining claim, or to quiet title thereto, the plaintiff need not, in the first instance, allege his citizenship and compliance with the act of Congress for acquiring title to such claim, but he may make general averment of his title or possession, which is sufficient in an action against a wrongdoer without right or title.² Where, in a suit for the possession of a mining claim, the petition alleges that the plaintiff is the owner and in possession of the property, claiming the right thereto, and the defendant's answer

Kenzie v. Brandon, 71 Cal. 209, 12 Pac. 428; *Garfield v. Willson*, 74 Cal. 175, 15 Pac. 620; *Jacobs v. Walker*, 76 Cal. 175, 18 Pac. 129; *Riddell v. Mullan*, 77 Cal. 577, 20 Pac. 91; *Reese v. Thornburn*, 78 Cal. 116, 20 Pac. 131; *McFaul v. Pfankuch*, 98 Cal. 400, 33 Pac. 397.

⁵ *Lane v. Pferdner*, 56 Cal. 122.

⁶ *Aurrecoechea v. Sinclair*, 60 Cal. 532; *Buckley v. Howe*, 86 Cal. 596, 25 Pac. 132.

¹ *Thomas v. Chisholm*, 13 Colo. 105, 21 Pac. 1019; *Keeler v. True-man*, 15 Colo. 143, 25 Pac. 311; *O'Reilly v. Campbell*, 116 U. S. 418, 29 L. Ed. 669, 6 Super. Ct. Rep. 421.

See, also, post, § 899.

² *McFeters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076.

denies the same, any insufficiency of the allegations as to possession is waived.³

In Montana, if the plaintiff is in possession, he brings an action to quiet title; if he is not in possession, his action is in the nature of an action in ejectment. In the former case the plaintiff must allege and prove possession; in the latter he maintains his action if he proves his right.⁴ In neither action is the question of citizenship involved.

§ 899. — ACTION TO DETERMINE RIGHT TO PATENT. In an action under the federal statute,¹ to determine the right to a patent to mineral land, each party is held to be an actor, and each must establish his claim against the government, as well as against his adversary. Each party must allege, in his pleading, all the facts essential to the validity of his claim, as, for example, the citizenship of the locators, the steps necessary to constitute and maintain the location, etc.²

§ 900. — ALLEGATION OF DAMAGES IN ACTION FOR PERSONAL INJURIES. The general rules as to the requisites and the sufficiency of the allegations in an action to recover damages for personal injuries caused or suffered through the negligent act of another, have already been discussed.¹ It has been held that in an action by a married woman for personal injuries, she is entitled to recover damages for any impairment of her capacity, as a previously healthy woman, to earn money, and, when so injured as to cause great pain and suffering in and about the womb and back,

³ *Bushnell v. Crooke Min. & Smelting Co.*, 12 Colo. 247, 21 Pac. 931.

⁴ *Wolverton v. Nichols*, 5 Mont. 89, 2 Pac. 308; *Milligan v. Savery*, 6 Mont. 129, 9 Pac. 894.

¹ U. S. Rev. Stats., § 2326, 6 Fed. Stats. Ann., 2d ed., p. 563.

² *Allyn v. Schultz*, 5 Ariz. 152, 48

Pac. 690; *Lee Doon v. Tesh*, 68 Cal. 43, 8 Pac. 621; *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182; *Anthony v. Jillson*, 83 Cal. 296, 23 Pac. 419; *Keeler v. Trueman*, 15 Colo. 143, 25 Pac. 311; *Buckley v. Fox*, 8 Idaho 248, 67 Pac. 659.

See, ante, § 898.

¹ See, ante, §§ 864-866.

the damages thereby resulting through impairment of her capacity to work need not be specially pleaded, but may be recovered under a general averment.²

§ 901. — ALLEGING MUTUAL MISTAKE. In an action to reform an agreement for the sale of land, an averment in the complaint, to the effect that by mistake a description of the land different from that intended by the parties to the agreement was inserted therein, is, in the absence of a demurrer, a sufficient allegation that the mistake was a mutual mistake of the parties to the agreement, and a finding in the language of the complaint is sufficient to support the judgment.¹

§ 902. — ALLEGATION NEGATIVING PRESUMPTION OF PAYMENT. In an action by a devisee to vacate a judgment for costs rendered against his testator, and an execution sale thereunder, an allegation of the complaint that neither the plaintiff nor his testator had any knowledge, notice, information, or belief that any judgment for costs had been entered, or that any cost bill had been filed, or that any execution had been issued, or of any sale thereunder, or of any certificate or deed by the sheriff, is sufficient to negative any presumption that the sheriff had paid or tendered to the plaintiff's testator the excess of the proceeds arising from the execution sale.¹ A judgment upon which no execution has been issued for twenty years, in the absence of explanatory facts or evidence, is presumed to be paid; and in order to avoid objection by demurrer, the plaintiff must allege in his complaint the facts and circumstances on which he relies to rebut such presumption.²

² *Hamilton v. Great Falls Street R. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

As to action by married woman for personal injuries, see, ante, §§ 622-621.

¹ *Newton v. Hull*, 90 Cal. 487, 27 Pac. 429.

¹ *Riddell v. Harrell*, 71 Cal. 254, 12 Pac. 67.

² *Beekman v. Hamlin*, 20 Ore. 352, 25 Pac. 672. See *Solomon's Heirs v. Solomon's Admr.*, 81 Ala. 507, 1 So. 82; *Solomon v. Solomon*, 83 Ala. 395, 3 So. 679; *Olden v. Hubbard*, 34 N. J. Eq. 85.

§ 903. — ALLEGATION OF PROBATE OF WILL: OWNERSHIP. The method and sufficiency of allegations as to matters of record¹ and the proceedings of courts² has already been discussed at some length; it may be here noted in connection with testing the complaint by demurrer that an averment in a pleading that a will was "probated by the Superior Court," is equivalent to an averment that the will was admitted to probate by the judgment of the Superior Court.³ And an averment that a given person was "during his lifetime" the owner of a piece of land, is equivalent to an averment that he was the owner continuously throughout his lifetime.⁴

§ 904. — ALLEGING UNILATERAL CONTRACT. A complaint in an action by a vendor against a vendee of goods for refusal to accept and pay therefor, which alleges that the plaintiff entered into a contract with the defendant to furnish, sell and deliver to the defendant certain specified goods at a stipulated price named, but nowhere alleges that the defendant bought, purchased or agreed to accept or pay therefor, or any part thereof, states a unilateral contract, and is obnoxious to a general demurrer.¹

¹ See, ante, § 720.

² See, ante, § 724.

³ Riddell v. Harrell, 71 Cal. 254, 259, 12 Pac. 67; Wise v. Hogan, 77 Cal. 184, 189, 19 Pac. 278.

⁴ Riddell v. Harrell, 71 Cal. 254, 12 Pac. 67.

¹ Robinson Consol. Min. Co. v. Johnson, 13 Colo. 258, 5 L. R. A. 769, 22 Pac. 459.

Acceptance of benefits of a unilateral contract. Binds the party to the extent of the acceptance, and where such acceptance is pleaded the complaint is good without alleging a purchase and an agreement to pay, because the law raises the presumption of a

promise to pay a reasonable price. See: COLO.—Gordon v. Darnell, 5 Colo. 302; Stiles v. McClellan, 6 Colo. 89; Robinson Consol. Min. Co. v. Johnson, 13 Colo. 258, 5 L. R. A. 769, 22 Pac. 459. ILL.—McKinley v. Watkins, 13 Ill. 140. ME.—Bean v. Burbank, 16 Me. 458, 33 Am. Dec. 681. N. Y.—Lester v. Jewett, 12 Barb. 502; reversed on another point in 11 N. Y. 453. TEX.—Railway Co. v. Mitchell, 38 Tex. 85. FED.—Richardson v. Hardwick, 106 U. S. 252, 27 L. Ed. 145, 1 Sup. Ct. Rep. 213.

Wheels required for season's use offered at a specified price, the delivery of one or more lots makes

In case of an option contract, which is a species of unilateral contract, after the revocation of the option, or the expiration of the time limit, the optioner may maintain an action in equity against the optionee to remove the cloud on his title, and the like.²

§ 905. — FAILURE TO ALLEGE PERFORMANCE OF CONDITIONS PRECEDENT—DEMAND. The necessity and sufficiency of the pleading of conditions precedent to the maintaining of an action, has already been fully treated.¹ As tested by demurrer, it may be observed that when the time has come for the doing of an act, which it is the duty of the defendant to do unconditionally, no demand other than the suit itself is necessary. Nor is a demand before suit required where it appears that it would have been unavailing, and would not have changed the right and relations of the parties, or where the answer denies the relation on which the action is founded, although a demand and refusal would otherwise be a condition precedent to the right of the plaintiff to maintain the action.³ Although, as a rule of practice, to justify a stockholder to maintain an action on behalf of the corporation, it must appear that some act ultra vires is threatened or done, fraudulent and injurious to the company or stockholders, or oppressive and unlawful to the minority stockholders, and that an effort to obtain redress at the hands of the directors has been made; yet, as a matter of law, the stockholders may maintain a suit in equity against the corporation and its board of directors whenever it appears that otherwise there will be a failure of justice;³

a binding contract for the entire season.—*Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 34 Am. St. Rep. 341, 54 N. W. 40.

² See James on Options, § 1124, and authorities cited.

¹ See, ante, §§ 487-494, 725.

³ *Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836.

¹ Code Pl. and Pr.—81

See, also, discussion and authorities, ante, § 490.

³ *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46; *Hawes v. Oakland, City of*, 104 U. S. 450; sub nom., *Hawes v. Contra Costa Water Co.*, 26 L. Ed. 827, affirming 5 Sawy. 287, Fed. Cas. No. 6235.

In New York a stockholder may

and where it is apparent that a demand upon the managing body of the corporation would be unavailing, an action by the stockholders may be maintained without alleging or proving any notice, request, demand or express refusal.⁴

§ 906. — INJUNCTION—CHARGING INTERFERENCE WITH FRANCHISE. The owner of an incorporeal hereditament, although he may have no estate in the land, nevertheless shows a sufficient case in equity to sustain an injunction, if his complaint avers possession and a right to the possession of a toll-road for the purpose of collecting tolls thereon, and that the county, through its board of supervisors, interferes with and obstructs the free use and enjoyment of his property by depriving him of his tolls.¹

§ 907. — REFORMATION OF INSTRUMENT—FAILURE TO INCLUDE PROPERTY. In an action for the purpose of securing the reformation of a mortgage on the ground of a mistake in the description of the property consisting in a failure to include property agreed to be mortgaged as security, so that the instrument as reformed will include such omitted property, it is not necessary that the complaint should allege that the mortgage, as mistakenly made, was insufficient security; the mortgagee is entitled to all the security for which he contracted.¹

§ 908. — SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY—EXECUTION AND ACKNOWLEDGMENT OF CONTRACT. The

maintain a suit on behalf of a corporation, to avoid an improper transaction consummated at the expense of the corporation before he acquired his stock.—Pollitz v. Gould, 202 N. Y. 11, Ann. Cas. 1912D, 1098, 38 L. R. A. (N. S.) 988, 94 N. E. 1088.

See, notes, 1912D, 1100; 38 L. R. A. (N. S.) 988.

⁴ Smith v. Dorn, 96 Cal. 73, 30

Pac. 1024; Jones v. Pearl Min. Co., 20 Colo. 417, 38 Pac. 700.

¹ Welsh v. Plumas County, 80 Cal. 338, 22 Pac. 254.

See Southern Pac. Co. v. Burr, 86 Cal. 279, 284, 24 Pac. 1032.

Penalty for interfering with ferry license, see, post, § 994.

¹ Stevens v. Holman, 112 Cal. 345, 351, 53 Am. St. Rep. 216, 41 Pac. 670.

absence of a certificate of acknowledgment upon a copy of a contract for the conveyance of land, as an exhibit to a complaint for the specific performance thereof, is not sufficient to show that the contract was not executed and acknowledged according to law, and where the complaint alleges that the plaintiff entered into a contract with the defendant, whereby he agreed to sell to the defendant, who agreed to purchase the land, such allegations will control, and imply the execution and acknowledgment of the contract according to law, for the purpose of supporting a judgment for specific performance of the contract.¹ The reason for this is the fact that the duty of the officer taking the acknowledgment, under the code provision,² to attach thereto a certificate of acknowledgment in the form prescribed, is purely ministerial, and being a ministerial act, such certificate forms no part of the contract or of the execution thereof; the instrument is "executed" when signed and acknowledged, and it is such execution, and not the certificate of acknowledgment that gives it validity and makes it binding and enforceable.³

§ 909. — TRUST INVOLVED—CONSTRUCTIVE OR RESULTING. It is a well-settled rule of pleading that in order to enforce a constructive or resulting trust, the facts from

¹ *Banbury v. Arnold*, 91 Cal. 606, 27 Pac. 934.

² *Kerr's Cyc. Cal. Civ. Code*, § 1188.

³ *Joseph Daugherty*, 60 Cal. 358, 360, (mortgage signed and acknowledged by a married woman is "executed"); *Hutchinson v. Ainsworth*, 73 Cal. 458, 2 Am. St. Rep. 823, 15 Pac. 82 (conveyance properly executed and acknowledged, though not properly certified, valid as between the parties to it and all the world, except subsequent bona fide purchasers); *Cordano v. Wright*, 159 Cal. 610,

615, Ann. Cas. 1912C, 1044, 115 Pac. 227 (examination of married woman separate and apart from her husband, as the law requires, the certificate of the officer taking it not necessary to the validity of a deed).

See *Stevens v. Holman*, 112 Cal. 345, 351, 53 Am. St. Rep. 216, 219, 44 Pac. 670.

Acknowledgment is a part of the execution of an instrument affecting real property.—See *Leonis v. Lazzarovich*, 55 Cal. 55; *Wedel v. Hermann*, 59 Cal. 507; *Joseph v. Dougherty*, 60 Cal. 358, 360.

which such trust is claimed to arise must be clearly alleged, and proved with certainty,¹ and where the complaint does not so allege the facts, it will be vulnerable on demurrer; the allegations must be sufficient to create a constructive or a resulting trust.² Where, in pursuance of an agreement to locate and develop a mining claim for the joint benefit of the parties, one of the parties locates the claim in his own name, he holds the legal title to the interest of the other in trust for him.³ And in an action to enforce such trust, and to compel a conveyance of his interest in the claim, the plaintiff need not allege citizenship in his complaint; and an allegation that "the plaintiff has performed all and singular his agreements and covenants with the defendant," is sufficient as an averment of the performance of the conditions on his part to be performed.⁴ If a patent to state lands is void, no constructive trust can be enforced therein by a third

¹ See *Woodside v. Hewell*, 109 Cal. 481, 42 Pac. 152; *McClure v. La Plata County Commrs.*, 19 Colo. 122, 34 Pac. 763; *First Nat. Bank v. Campbell*, 2 Colo. App. 271, 30 Pac. 357; *Phillips v. Overfield*, 100 Mo. 466, 13 S. W. 705.

² *Muller v. Buyck*, 12 Mont. 354, 30 Pac. 386.

³ CAL.—*Settembre v. Putnam*, 30 Cal. 490; *Moritz v. Lavelle*, 77 Cal. 10, 12, 11 Am. St. Rep. 229, 231, 16 Morr. Min. Rep. 236, 18 Pac. 803. COLO.—*Lipscomb v. Nichols*, 6 Colo. 290, 293. IDAHO—*Hawkins v. Spokane Hydraulic Min. Co.*, 3 Idaho 650, 33 Pac. 40; *Morrow v. Matthew*, 10 Idaho 435, 79 Pac. 201. MONT.—*Hibour v. Reeding*, 3 Mont. 15, 21; *Eisenberg v. Goldsmith*, 42 Mont. 579, 113 Pac. 1131. NEV.—*Welland v. Huber*, 8 Nev. 203. N. M.—*Eberle v. Carmichael*, 8 N. M. 699, 702, 47 Pac. 718. UTAH—*Kahn v.*

Old Telegraph Co., 2 Utah 218. WASH.—*Raymond v. Johnson*, 17 Wash. 232, 61 Am. St. Rep. 608, 49 Pac. 493. FED.—*Walcot v. Watson*, 53 Fed. 435; *Book v. Justice Min. Co.*, 58 Fed. 119, 17 Morr. Min. Rep. 617; *Shea v. Nilima*, 66 C. C. A. 263, 133 Fed. 213; *Hendrichs v. Morgan*, 92 C. C. A. 558, 167 Fed. 108.

Corporation organized which issued stock to locator for the mining claim, and the shares of stock turned over to the locator, he is not a trustee, but a bailor of such shares of stock.—*Doyle v. Burns*, 123 Iowa 488, 99 N. W. 195.

⁴ *Moritz v. Lavelle*, 77 Cal. 10, 12, 11 Am. St. Rep. 229, 231, 16 Morr. Min. Rep. 236, 18 Pac. 803; *Hanson v. Fricker*, 79 Cal. 283, 21 Pac. 751.

As to necessity of alleging citizenship, see, ante, §§ 898, 899.

person alleging himself to have been entitled thereto. And if the patent is valid, no constructive trust can be enforced for fraud in procuring the patent, unless the claimant affirmatively alleges and proves that he possessed the necessary qualifications entitling him to a patent.⁵ An administrator has no capacity to bring an action to enforce a trust in lands conveyed by the decedent in his lifetime, and to compel a conveyance of the legal title.⁶

§ 910. — **WILL CONTEST—ALLEGATIONS NECESSARY.** In a contest arising upon the probate of a will, the contestants are plaintiffs in the matter, and it devolves upon them to allege all facts necessary to sustain a claim that the will was not properly signed and witnessed, or other ground of contest,¹ and a statement in the language of the statute, or of the evidence of the facts, is not sufficient.²

⁵ *Peabody v. Prince*, 78 Cal. 511, 21 Pac. 123.

⁶ *Field v. Andrada*, 106 Cal. 107, 39 Pac. 323.

Requisites of complaint to impeach conveyance by trustee. See *De Mares v. Gilpin*, 15 Colo. 76, 24 Pac. 568.

¹ *Kerr's Cyc. Cal. Code Civ. Proc.*, 2d ed., § 1312; *Consolidated Supp.* 1906-1913, p. 1850.

Form of petition on contest on ground of fraud and undue influence, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 1041, Form No. 525.

Form of petition on contest on ground of unsoundness of mind and undue influence, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 1043, Form No. 526.

Form of petition on contest of will on ground of unsoundness of

mind fraud, etc., see *Church's Probate Law and Practice*, vol. II, p. 1646, Form No. 986.

Form of petition on contest of will on various grounds, see *Church's Probate Law and Practice*, vol. II, p. 1648, Form No. 987.

Form of petition on contest of nuncupative will, see *Church's Probate Law and Practice*, vol. II, p. 1726, Form No. 1033.

Forms of petitions on contest of will after probate, see *Church's Probate Law and Practice*, vol. II, pp. 1694, 1695, Forms Nos. 1012, 1013.

Skeleton form for contest of will on any or all of the grounds on which will can be contested, either before or after probate, see 3 *Alexander's Commentaries on Wills*, p. 2746, Form No. 36.

² *Dalrymple, Estate of*, 67 Cal.

An allegation that the mind of the decedent was weak, debilitated, and deranged to such an extent as to incapacitate him from making or undertaking a will or codicil tenders an issue as to "the competency of the decedent to make a last will and testament."³ But when the grounds of contest embrace conclusions of law, as menace, duress, or the like, the facts relied upon to show such conclusions must be pleaded.⁴ It is not essential that the petition for the probate of a will should state whether it is an olographic or other species of will, nor does any defect in form, or in the statement of the jurisdictional facts actually existing, invalidate the probate.⁵ A petition for the probate of a will alleged to have been fraudulently destroyed during the lifetime of the testator, must specifically state the facts and circumstances constituting the fraud.⁶ An allegation in a petition to establish and prove a lost will, stating that "said deceased, at the time of his death, left a will which your petitioner alleges to be the last will and testament of said deceased," is equivalent to alleging that the will was in existence at the time of the death of the testator, as the statute in such cases requires.⁷ Any petition not meeting these requirements will be vulnerable on general or special demurrer.

444, 7 Pac. 906; Burrell, Estate of, 77 Cal. 479, 19 Pac. 880; Gregory, Estate of, 133 Cal. 131, 137, 65 Pac. 315.

Burden of proof on contestant, including the negative of no execution of will.—Latour, Estate of, 140 Cal. 414, 419, 420, 73 Pac. 1070, 74 Pac. 441; Clements v. McGinn, 4 Cal. Unrep. 163, 33 Pac. 920.

³ Kohler, Estate of, 79 Cal. 313, 2 Pac. 758. See Dolbeer, Estate of, 3 Cof. Prob. (Cal.) 245.

⁴ Gharky, Estate of, 57 Cal. 274,

approved in Goodwin v. Goodwin, 59 Cal. 561, (although the case is decided upon other grounds); Sheppart, Estate of, 149 Cal. 219, 221, 85 Pac. 312, 313 (dismissing petition because facts not stated); Goodspeed, Estate of, 2 Cof. Prob. (Cal.) 149; Murphy's Estate, In re, 43 Mont. 353, 361, 116 Pac. 1004.

⁵ Learned, Estate of, 70 Cal. 140, 11 Pac. 587.

⁶ Kidder, Estate of, 66 Cal. 487, 6 Pac. 326.

⁷ Harris' Estate, In re, 10 Wash. 555, 39 Pac. 148.

II. Plaintiff's Demurrer.

§ 911. IN GENERAL. The nature and purpose of a demurrer is the same, whether filed by the defendant or by the plaintiff, and it is not necessary to repeat here what has been said in the first division of this chapter touching the nature of a demurrer and the method of taking objection by demurrer,—i. e., (1) general demurrers, which point out nothing and (2) special demurrers, which specifically point out the infirmity relied on. All that need be said at this time and in this place is that, in California, the plaintiff, at any time within ten days after the service of an answer, may demur thereto, or to one or more of the several defenses or counter-claims set up therein.¹

¹ Kerr's Cyc. Cal. Code Civ. Proc., 2d ed., § 443; Consolidated Supp 1906-1913, p. 1461.

CHAPTER VII.

DEMURRER—GROUNDS OF.

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I. Defendant's Grounds of Demurrer.

§ 912. GROUNDS OF DEMURRER TO COMPLAINT—IN CALIFORNIA. In all the jurisdictions having the reformed procedure there are provided statutory grounds or causes for demurrer to the complaint; these statutory grounds vary in the different jurisdictions, but are substantially the same in the main features or principal grounds of demurrer, but what is a ground for demurrer in one state may not be in another, and what is a single ground in

one state,—e. g., ambiguity, uncertainty and unintelligibility,—may be separate grounds in another state.

In California the defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

I. That the court has no jurisdiction (1) of the person of the defendant,¹ or (2) of the subject of the action;²

II. That the plaintiff has not legal capacity to sue;³

III. That there is another action pending between the same parties for the same cause;⁴

IV. That there is (1) a defect⁵ or (2) a misjoinder⁶ of parties plaintiff or defendant;

V. That (1) several causes of action have been improperly united, or (2) are not separately stated;⁷

VI. That the complaint does not state facts sufficient to constitute a cause of action;⁸

VII. That the complaint is ambiguous;⁹

¹ Form of demurrer on ground court has no jurisdiction of the person, *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 41, Form No. 27.

² Form of demurrer on the ground the court has no jurisdiction of the subject-matter of the action, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 42, Form No. 28.

³ Form of demurrer on the ground that the plaintiff has no legal capacity to sue, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 42, Form No. 29.

⁴ Form of demurrer on the ground that there is another action pending between the parties for the same cause, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 42, Form No. 30.

⁵ Form of demurrer on the ground that there is a defect of parties, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 42, Form No. 31.

⁶ Form of demurrer on the ground that there is a misjoinder of parties, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 42, Form No. 32.

⁷ Form of demurrer on the ground that several causes of action are improperly joined, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 43, Form No. 33.

⁸ Form of demurrer on the ground complaint does not state facts sufficient to constitute a cause of action, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 43, Form No. 35.

⁹ Form of demurrer on the

VIII. That the complaint is unintelligible; or,

IX. That the complaint is uncertain.¹⁰

§ 913. — GROUND OF DEMURRER MUST BE SPECIFIED. The California procedural code requires that the demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken.¹ Unless it does so, it may be disregarded.² It may be taken to the whole complaint, or to any of the causes of action stated therein, and the defendant may demur and answer at the same time.³ Similar provisions are found in other jurisdictions. The effect of this provision upon a general demurrer which does not state the ground of objection, when the court has no jurisdiction, or the complaint fails to state facts sufficient to action, has already been discussed.⁴

§ 914. — NO OTHER GROUNDS OF DEMURRER. The only cause for a demurrer, or ground upon which a demurrer can be interposed to a complaint, are the causes or grounds enumerated in the statute;¹ any other vice in the complaint must be reached by motion or by answer. Unless a ground of demurrer be included under one or

ground that the complaint is ambiguous, or is unintelligible, or is uncertain, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 43, Form No. 36.

¹⁰ Kerr's Cyc. Cal. Code Civ. Proc., 2d ed., § 430; Consolidated Supp. 1906-1913, p. 1450.

¹ Form of demurrer upon the grounds,—first, want of plaintiff's legal capacity to sue; second, that the petition does not state facts sufficient to constitute a cause of action; third, misjoinder of alleged causes of action, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 45, Form No. 37.

² In Iowa the same rule prevails, and perhaps elsewhere. See *Crouch v. Crouch*, 9 Iowa 269; *Singer v. Cavers*, 26 Iowa 178; *McLaughlin v. Bascomb*, 36 Iowa 593; *Davidson v. Briggs*, 61 Iowa 309, 16 N. W. 135; *Stokes v. Sprague*, 110 Iowa 89, 81 N. W. 195; *Robinson v. Grant*, 119 Iowa 573, 93 N. W. 586; *Timken Carriage Co. v. Smith*, 123 Iowa 554, 99 N. W. 183; *Slafter v. Concordia Fire Ins. Co.*, 142 Iowa 116, 120 N. W. 706.

³ Kerr's Cyc. Cal. Code Civ. Proc., 2d ed., 431; Consolidated Supp. 1906-1913, p. 1455.

⁴ See, ante, § 887.

¹ See, ante, § 912.

more of such causes, it can not be sustained.² A defect which will defeat the plaintiff's present right to recover, in whole or in part, is a good ground of demurrer.³ The demurrer is good if it assigns the grounds of objection substantially as they are defined in the statute.⁴ A demurrer will lie only when one of the several grounds of demurrer is apparent on the face of the complaint,⁵ and the defendant is confined to the objections specified.⁶

§ 915. — 1. WANT OF JURISDICTION—IN GENERAL. It may be stated generally that the insufficiency of the pleading does not defeat the court's jurisdiction of the case, unless there is some express statutory provision to that effect.¹ As a general rule, the sufficiency of a petition can not be raised by challenging the jurisdiction of a court; but this rule, like all others, is subject to certain exceptions, as, for example, where the law provides for the bringing of a certain class of actions in the county where the defendant resides, or may be sued, and chal-

² *Hentsch v. Porter*, 10 Cal. 555; *Kyle v. Craig*, 125 Cal. 107, 111, 57 Pac. 791 (using two counts to state one cause of action not ground for demurrer.—See, ante, § 830); *Carpenter v. Smith*, 20 Colo. 40, 36 Pac. 789 (fact that complaint on information and belief, not a ground for demurrer); *Campbell v. Campbell*, 121 Ind. 178, 23 N. E. 81; *Mayberry v. Kelly*, 1 Kan. 116; *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44; *Marie v. Garrison*, 83 N. Y. 14, reversing 45 N. Y. Super. Ct. Rep. (13 Jones & S.) 157; *Harper v. Chamberlain*, 11 Abb. Pr. (N. Y.) 234; *Mader v. Plano Mfg. Co.*, 17 S. D. 553, 556, 97 N. W. 843, 845; *Renton v. St. Louis*, 1 Wash. Tr. 215.

"Defect of parties" alleged as ground of demurrer is good and a

statute, like the California statute (see, ante, § 911, subd. 4), providing that "misjoinder of parties" is ground for demurrer.—*Mader v. Plano Mfg. Co.*, 17 S. D. 556, 97 N. W. 845.

³ *Hentsch v. Porter*, 10 Cal. 555.

⁴ *Henderson v. Johns*, 13 Colo. 280, 22 Pac. 460; *Lagow v. Neilson*, 10 Ind. 183; *DeWitt v. Swift*, 3 How. Pr. (N. Y.) 280.

⁵ See, ante, § 912, introductory clause.

⁶ *Lopez v. Central Arizona Min. Co.*, 1 Ariz. 464, 2 Pac. 748; *Loomis v. Tift*, 16 Barb. (N. Y.) 541.

¹ See *Reed v. Muscatine, City of*, 104 Iowa 183, 73 N. W. 579; *Kennedy v. Roberts*, 105 Iowa 521, 75 N. W. 363; *Mengel v. Mengel*, 145 Iowa 737, 120 N. W. 72, 122 N. W. 899.

lenge to the jurisdiction at the very outset raises the question whether or not the cause of action declared upon is one contemplated by the statute. In such a case an objection to the jurisdiction should be treated as a general demurrer to the petition.²

Face of complaint must show that the court is without jurisdiction of the person of the defendant or of the cause of action, before a demurrer will lie on this ground.³

§ 916. ——— CONSTRUCTION AND APPLICATION OF STATUTE. The meaning of the clause in the statute providing as a ground of demurrer “that the court has no jurisdiction of the person of the defendant,”¹ is that the person is not subject to the jurisdiction of the court, and not that the suit has not been regularly commenced. If the suit has not been regularly commenced, the remedy of the defendant is by motion against the irregularity.² Jurisdiction is the power to hear and determine the controversy brought before the court.³ Jurisdiction is the power to hear and determine, or to hear without determining, or to determine without hearing.⁴ In an early case in California⁵ it was held that “a demurrer to the jurisdiction of the court only lies where the want of such jurisdiction appears affirmatively upon the face of the complaint. In a court of limited and special jurisdiction the rule is otherwise.”⁶ A Justice’s Court is an inferior

² Cobbey v. State Journal Co., 77 Neb. 626, 113 N. W. 224; Tate v. Rakow, 84 Neb. 459, 121 N. W. 460.

³ Knight v. Le Beau, 19 Mont. 223, 47 Pac. 952; Schaad v. Robinson, 50 Wash. 283, 97 Pac. 104.

¹ See, ante, § 912, subd. 1.

² Nones v. Hope Mut. Life Ins. Co., 3 N. Y. Code Rep. 161, 8 Barb. 541, 5 How. Pr. 96.

³ Central Pac. R. Co. v. Placer County Board of Equalization, 43 Cal. 365.

Misnomer to classify the objection that a complaint does not state facts sufficient to constitute a cause of action as an objection against the jurisdiction of the court.—Toothaker v. Boulder, City of, 13 Colo. 219, 23 Pac. 468.

⁴ Bennett, ex parte, 44 Cal. 85.

⁵ Doll v. Feller, 16 Cal. 432.

⁶ Koenig v. Nott, 2 Hilt. (N. Y.) 323, 8 Abb. Pr. 884; Wilson v. New York, City of, 6 Abb. Pr. (N. Y.) 6, 16 How. Pr. 500.

court, and its jurisdiction must be shown affirmatively by a party relying upon or claiming any right under its judgments.⁷ Where an inferior tribunal, as the board of land commissioners, has once acquired jurisdiction of a matter, its subsequent proceedings can not be collaterally questioned for mere error or irregularity.⁸ There are four modes of acquiring jurisdiction of the person: (1) By personal service of the summons, and copy of complaint,⁹ (2) by constructive service, or by what is commonly called publication of summons,¹⁰ (3) by voluntary appearance and submission to the jurisdiction of the court,¹¹ and (4) by admission of service.¹² Thus, where A and B admit "due service" in an action against them and others, the court thereby acquires jurisdiction of them.¹³ The court whose jurisdiction is impeached has power to determine the question whether it possesses it or not.¹⁴

Under the laws of Washington jurisdiction can be obtained of the person of a defendant by the service upon him of the summons prescribed in the act, and without the service of the complaint in the action, its filing with the clerk of the court being sufficient.¹⁵

§ 917. — 2. WANT OF LEGAL CAPACITY TO SUE — IN GENERAL. We have already seen that a complaint should contain an allegation as to the capacity in which the plaintiff sues, for the purpose of showing that he has a legal right to maintain the action.¹ The want of capacity to sue, as a ground of demurrer, must appear upon the face of the complaint before a demurrer will lie,² and

⁷ *Jolle v. Folz*, 34 Cal. 321;

Winter v. Fitzpatrick, 35 Cal. 269.

⁸ *Bernal v. Lynch*, 36 Cal. 135.

⁹ As to personal service of process, see, ante, §§ 182-186.

¹⁰ *Hahn v. Kelley*, 34 Cal. 391, 94 Am. Dec. 742.

As to service by publication, see ante, §§ 193-206.

¹¹ As to voluntary appearance, see, ante, §§ 255-288.

¹ Code Pl. and Pr.—§2

¹² As to acceptance of service of process, see, ante, §§ 242-254.

¹³ *Sharp v. Brunnings*, 35 Cal. 528.

¹⁴ *King v. Poole*, 36 Barb. (N. Y.) 242.

¹⁵ *Baldwin v. Baer*, 10 Wash. 414, 39 Pac. 117.

¹ See, ante, §§ 814-824.

² *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Wilhoit v. Cunningham*,

that defect must be affirmatively and not negatively shown.³ In other words, no ground of demurrer is furnished by the fact that the complaint does not show on its face the capacity of the plaintiff to sue, it must appear from the complaint that he has no capacity to maintain the action;⁴ that is, the defect must appear from the allegations, not want of allegation.⁵ Thus, it has been said that the fact that a complaint fails to allege that the affidavit required by statute to be attached to the inventory of an assignee is thereunto affixed, does not furnish a ground of attack by demurrer.⁶

§ 918. ——— COMPANY—MEMBERSHIP IN. The failure to aver membership in a company in the body of the complaint is a ground for demurrer.¹

§ 919. ——— CORPORATION—INCORPORATION. In an action against a corporation upon a contract made with it, the complaint must allege its incorporation, or it will be bad upon demurrer.¹ In action by corporation the complaint must affirmatively show incorporation and right to sue and be sued in the courts of the state; but the omission on the part of a corporation plaintiff to show their incorporation can not be reached by a general demurrer, based upon the ground that the complaint does not state facts sufficient to constitute a cause of action. That the plaintiff has not legal capacity to sue is made a

87 Cal. 453, 459, 25 Pac. 675; Sargent v. Cunningham, (Cal.) 25 Pac. 677; Locke v. Klunker, 123 Cal. 231, 239, 55 Pac. 993.

³ See Locke v. Klunker, 123 Cal. 231, 239, 55 Pac. 993.

⁴ Swamp & Overflowed Land Dist. v. Feck, 60 Cal. 403, 405.

⁵ Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Wilhoit v. Cunningham, 87 Cal. 453, 459, 25 Pac. 675; Herbst Importing Co. v. Hogan, 16 Mont. 384, 41 Pac. 135; Phoenix

Bank v. Donnell, 41 Barb. (N. Y.) 571; affirmed, 40 N. Y. 410; Swing v. White River Lumber Co., 91 Wis. 517, 65 N. W. 174.

⁶ Wilhoit v. Cunningham, 87 Cal. 453, 459, 25 Pac. 675.

¹ Tolmie v. Dean, 1 Wash. Ter. 46.

As to allegations in complaint in action by a company or copartnership, see, ante, § 819.

¹ Tolmie v. Dean, 1 Wash. Ter. 46.

ground for special demurrer, and must, therefore, be specially assigned.² Where a corporation sues, it must show how it was created; without this there is a fatal omission of one of the material elements of a good cause of action.³

§ 920. ——— COUNTY — REJECTION OF CLAIM. A county has legal capacity to sue.¹ The statute provides that no person shall sue a county, unless the claim has been first presented to the board of supervisors, and been by them rejected; this fact must appear in the complaint, or it is demurrable;² and the rule applies to torts as well as contracts, it has been held.³

§ 921. ——— FOREIGN STATE—OFFICIAL REPRESENTATIVE. Demurrer is allowed to a bill brought by the "United States of America," on the ground that a foreign state is not allowed to sue in a court of equity, without putting forward some public officer on whom process may be served, and who can be called upon to give discovery on a cross-bill.¹

§ 922. ——— GUARDIAN OF INFANT, ETC.—ALLEGATION OF APPOINTMENT. A complaint omitting to allege the appointment of a guardian for an infant plaintiff, or other

² *Bank of Lowville v. Edwards*, 11 How. Pr. (N. Y.) 216; *Harmon v. Vanderbilt Hotel Co.*, 79 Hun (N. Y.) 392, 29 N. Y. Supp. 783; affirmed, 143 N. Y. 665, 39 N. E. 20; *Fox v. Erie Preserving Co.*, 93 N. Y. 54.

³ *Johnson v. Kemp*, 11 How. Pr. (N. Y.) 186.

As to allegations in complaint in action by a corporation, see, ante, § 820.

¹ *Placer County v. Astin*, 8 Cal. 303, 305.

² *McCann v. Sierra County*, 7 Cal. 121, 123. See *Farmers' &*

Merchants' Bank v. Los Angeles, City of, 151 Cal. 657, 91 Pac. 796; *Rio Grande County Commrs. v. Pbye*, 27 Colo. 107, 109, 59 Pac. 55; *Hoexter v. Judson*, 21 Wash. 646, 650, 59 Pac. 498.

See, also, note 68 Am. Dec. 296.

Failure to act by board of County Commissioners, equivalent to a rejection.—*Nickeus v. Lewis County*, 23 Wash. 125, 129, 62 Pac. 763.

³ *McCann v. Sierra County*, 7 Cal. 121, 123.

¹ *United States of America v. Wagner*, L. R. 3 Eq. 724.

incompetent, is impeachable by demurrer under this subdivision.¹

§ 923. ——— NOTE HELD IN TRUST—POWER TO SELL, NOT COLLECT. A plaintiff has no legal capacity to sue in an action on a promissory note, when it appears on the face of the complaint that plaintiff holds the note as collateral security for a debt, under a trust to sell it, but with no power to sue.¹

§ 924. ——— RECEIVER — ALLEGATION OF APPOINTMENT. A demurrer on the ground that it does not appear that plaintiff had any title to the note sued on, is insufficient to raise the question as to his right to sue as receiver.¹ Where a complaint by a receiver alleges that he was duly appointed receiver, but does not state facts from which the court can see that he was so appointed, the proper remedy is by motion to make more definite and certain.²

§ 925. ——— SPECIAL ADMINISTRATOR — WANT OF CAPACITY TO SUE. It is not good ground for demurrer that it does not sufficiently appear upon the face of the complaint that the plaintiff has the legal capacity to sue as special administrator; that omission can only be taken advantage of by answer, if the complaint does not show on its face that the special administrator had not the legal capacity to sue.¹

§ 926. ——— STATEMENT OF GROUNDS—FACTS SHOWING INCAPACITY TO SUE. Where the demurrer specified as

¹ Grantman v. Thrall, 44 Barb. 173.

As to allegations in complaint in action by a guardian, see, ante, § 821.

¹ Nelson v. Eaton, 7 Abb. Pr. (N. Y.) 305, reversing 15 How. Pr. 305.

As to action by trustee of an express trust, see, ante, § 823.

¹ White v. Low, 7 Barb. (N. Y.) 204.

² Cheney v. Fisk, 22 How. Pr. (N. Y.) 236.

¹ Miller v. Luco, 80 Cal. 257, 22 Pac. 195. See Swamp & Overflowed Land Dist. v. Feck, 60 Cal. 403, 405; Phoenix Bank v. Donnell, 40 N. Y. 410, affirming 41 Barb. 571.

the ground of the demurrer that the complaint did not state facts sufficient to show a cause of action, among other things that it did not show plaintiff's capacity to sue, it was held a sufficient demurrer to that point.¹ The facts showing the capacity of the plaintiffs to sue are not facts constituting the cause of action.²

In an action for death caused by negligence, brought by the mother, brothers, and sisters of the deceased, a demurrer on the ground that the plaintiffs had not legal capacity to sue, is too broad, and should be overruled, it appearing that the mother had the right to sue as sole heir of the deceased.³

§ 927. ——— WAIVER OF OBJECTION—FAILURE TO DEMUR. The objection that plaintiff has no legal capacity to sue is waived if not taken by demurrer or answer.¹ So held in New York when the objection was that plaintiff was a married woman, suing without a next friend, before the act of 1857.² So held when the objection was that plaintiff was a foreign executor.³ So held in an action brought by a husband and wife to recover possession of land, when plaintiffs claimed as owners in right of the wife, and on the trial the defendants relied on an appointment by the husband and wife, under an antenuptial agreement between them, of a trustee for the property and effects of the wife.⁴

¹ *Connecticut Bank v. Smith*, 9 Abb. Pr. (N. Y.) 168, 17 How. Pr. 487.

² *Viburt v. Frost*, 3 Abb. Pr. (N. Y.) 119, 120; *Bank of Lowville v. Edwards*, 11 How. Pr. (N. Y.) 216; *Hobart v. Frost*, 12 N. Y. Super. Ct. Rep. (5 Duer) 672; *Myers v. Machado*, 13 N. Y. Super. Ct. Rep. (6 Duer) 678, 6 Abb. Pr. 198, 14 How. Pr. 149.

³ *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269.

¹ *Palmer v. Davis*, 28 N. Y. 242; *Hastings v. McKinley*, 1 E. D. Smith (N. Y.) 273.

Objection waived by failure to demur. See, ante, §§ 877, 878.

—By answering over. See, ante, § 879.

² *Palmer v. Davis*, 28 N. Y. 242.

³ *Robbins v. Wells*, 24 N. Y. Super. Ct. Rep. (1 Robt.) 666, 18 Abb. Pr. 191, 26 How. Pr. 15.

⁴ *Van Amringe v. Barnett*, 21 N. Y. Super. Ct. Rep. (8 Bosw.) 357.

§ 928. ——— 3. ANOTHER ACTION PENDING BETWEEN THE SAME PARTIES—IN GENERAL. The court may have jurisdiction (1) of the person of the defendant, and (2) of the subject-matter of the action, and the plaintiff may have the legal capacity to sue, but there may be another action pending between the same parties for the same cause. The inquiry whether there be another action pending, etc., can rarely be raised by demurrer, for, in most instances, the facts disclosing this will not appear on the face of the complaint, and hence that issue must be presented by the answer.

Another suit pending between the same parties for the same cause in which no process has been issued and no appearance by the defendant, there is no suit pending which bars the latter action,¹ although some courts uphold a plea in abatement based upon the former action.²

§ 929. ——— VICE MUST BE APPARENT. The fact that there is another action pending between the same parties for the same cause must appear on the face of the complaint, for even if there is another action pending between the same parties, for the same thing, and the fact does not appear on the face of the complaint, the remedy is by answer, and not by demurrer.¹ For a demurrer to lie under this subdivision, it must appear that both actions are for the identical cause of action.² But the pendency of an action for divorce is no cause for demurrer to another for subsequent offenses.³

§ 930. ——— FORECLOSURE—IN NEVADA. In an action to foreclose a mortgage against the estate of a

¹ Weaver v. Conger, 10 Cal. 233.

355, 36 Pac. 258; Jackson v. Mc-

² Wilson v. Atlanta, K. & N. R. Co., 115 Ga. 171, 176, 41 S. E. 699.

Auley, 13 Wash. 298, 43 Pac. 41.

¹ Burrowes v. Miller, 2 N. Y. Code Rep. 101, 5 How. Pr. 51; Hornfager v. Hornfager, 1 N. Y.

² Kelsey v. Ward, 16 Abb. Pr.

(N. Y.) 98; Paige v. Wilson, 21 N. Y. Super. Ct. Rep. (8 Bosw.) 294.

Code Rep. (N. S.) 412, 6 How. Pr. 279; Lowman v. West, 8 Wash.

³ Cordier v. Cordier, 20 How. Pr. (N. Y.) 187.

deceased person, in Nevada, where the complaint shows the fact that the claim had been allowed by the administrator, it is demurrable under this subdivision, the same as if it alleged a former suit and judgment upon the same claim.¹

Presentation to administrator for allowance of all claims against estates of decedents, required by statute, does not prevent the foreclosure of a mortgage without presentation for allowance, in some jurisdictions.²

§ 931. ——— FORMER ADJUDICATION. Where a bill disclosed that the subject-matter had been litigated between the same parties in a prior suit, and that in the said suit the plaintiff in this suit had set up the same equity which he claims by this bill, the bill was held bad on demurrer, and was ordered to be dismissed.¹ The fact that a vessel, lost while being towed out to sea, is insured, does not divest the owner of the right of action against the steamtug towing her for her loss, and his recovery will bar another action for the same cause, and, therefore, the defendant can not raise the objection that the action is not brought by the real party in interest.²

§ 932. ——— QUIETING TITLE—EJECTMENT PENDING. In an action to quiet plaintiff's title to land, alleged to be clouded by defendants giving out that the title is in themselves and not in plaintiff, an action of ejectment pending, in which the defendant does not ask

¹ Corbett v. Rice, 2 Nev. 330.
See Fallon v. Butler, 21 Cal. 24,
81 Am. Dec. 140.

² See First Nat. Bank v. Glenn,
10 Idaho 224, 238, 109 Am. St.
Rep. 204, 77 Pac. 623.

¹ Barnett v. Kilbourne, 3 Cal.
327.

² White v. Mary Ann, The, 6 Cal.
462, 65 Am. Dec. 523. See Bern-
stein v. Downs, 112 Cal. 197, 206,
44 Pac. 557.

As to requirement that action
shall be prosecuted by the real
party in interest, see, ante, §§ 583-
587.

Objection plaintiff not real party
in interest will not avail where
the defendant is protected against
a subsequent action for the same
cause. — Bernstein v. Downs, 112
Cal. 197, 206, 44 Pac. 557; Burrows
v. Stryker, 47 Iowa 447.

for affirmative relief, is not available as a defense,¹ because to be available the cause of action in the pending action must be the same, as well as the parties the same.²

§ 933. ——— RECEIVER'S JUDGMENT—ACTION BY PARTY. A judgment in favor of a receiver is a bar to a subsequent action in the same cause by the party for whom he was appointed, and a demurrer lies under this sub-division.¹

§ 934. ——— WHEN DEMURRER LIES. A demurrer lies under this subdivision when there is an action between the same parties in any proceeding in which the rights of the plaintiff in the last suit would be fully protected, whether strictly an action, attachment, citation before the surrogate, or a proceeding in court founded on a petition.¹ So, the pendency of another action brought by a defendant in partition would come under the rule.² But the general rule is that the plaintiff in the latter action must be the plaintiff in the former, in order to sustain this plea.³ Nor can it be sustained if the other action is for relief, which could not be granted in the action in which the demurrer is interposed.⁴ Nor is it sustained

¹ Ayres v. Bensley, 32 Cal. 620.

² Id.; Helfrich v. Romer, 16 Cal. App. 433, 436, 118 Pac. 458, 459; Colburn v. Dortic, 49 Colo. 90, 95, 111 Pac. 837, 839; Rodney v. Gibbs, 184 Mo. 1, 10, 82 S. W. 187, 189.

See, also, authorities, post, § 934, footnote 3.

¹ Tinkham v. Borst, 24 How. Pr. (N. Y.) 246.

¹ Groshon v. Lyon, 16 Barb. 461.

² Hornfager v. Hornfager, 1 N. Y. Code Rep. (N. S.) 412, 6 How. Pr. 279.

³ O'Connor v. Blake, 29 Cal. 312; Ayres v. Bensley, 32 Cal. 630;

Walsworth v. Johnson, 41 Cal. 61, 63; Valley Bank v. Shenandoah Nat. Bank, 109 Iowa 43, 46, 79 N. W. 391; Monroe v. Reid, 46 Neb. 316, 330, 64 N. W. 983; Certain Logs of Mahogany, 2 Sumn. 589, 593, Fed. Cas. No. 2559; Wadleigh v. Veazle, 3 Sumn. 165, Fed. Cas. No. 17031.

See, also, authorities, ante, § 531, footnote 2.

Plaintiff in one suit defendant in the other, objection not available.—Walsworth v. Johnson, 41 Cal. 61, 63; Monroe v. Reid, 46 Neb. 316, 330, 64 N. W. 983.

⁴ Haire v. Baker, 5 N. Y. 357.

where the other action is in a court of another state or a court of the United States.⁵

§ 935. — 4. DEFECT IN OR MISJOINDER OF PARTIES—IN GENERAL. The (1) nonjoinder or (2) the misjoinder of parties, either plaintiff or defendant, being made a ground of demurrer by this subdivision, it is thought that a demurrer alleging “defect of parties,” and pointing out specifically wherein there is a defect is sufficient, because such provision means insufficient parties, and has no application to a case of too many parties, or the joining of a person having no interest in the litigation.¹ Thus, it has been said that a demurrer alleging defect of parties plaintiff should be for nonjoinder and not for misjoinder.²

Demurrer must specifically point out wherein the vice complained of lies, where objection taken on this ground; it not being sufficient in demurring on either the ground of nonjoinder or misjoinder to simply follow the language of the statute.³

§ 936. — — — NONJOINDER OF PARTIES—PARTIES PLAINTIFF. A defect of parties plaintiff is a good cause of demurrer by all the defendants.¹ When it appears upon the face of the complaint that the presence of other parties plaintiff is necessary to a complete determination of the controversy, a demurrer will lie for a defect of parties plaintiff.² But the fact that the party whose nonjoinder is alleged as ground of demurrer is living must appear affirmatively, on the face of the complaint.³ If the

⁵ *Burrowes v. Miller*, 2 N. Y. Code Rep. 101, 5 How. Pr. 51; *Cook v. Litchfield*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 330, 10 Leg. Obs. 330; reversed on another point, 9 N. Y. 279.

¹ *Mader v. Plano Mfg. Co.*, 17 S. D. 553, 556, 97 N. W. 843, 845.

See, also, discussion and authorities, ante, § 912, footnote 2.

² *Tieman v. Sachs*, 52 Ore. 560, 98 Pac. 163.

³ *O'Callaghan v. Bode*, 84 Cal. 489, 495, 24 Pac. 269.

¹ *Brownson v. Gifford*, 8 How. Pr. 389, 392; *Walroth v. Handy*, 24 How. Pr. (N. Y.) 353.

² *Cohen v. Ottenheimer*, 13 Ore. 220, 10 Pac. 20.

³ *Indiana, State of, v. Woram*,

fact does not appear affirmatively, the objection must be taken by answer.⁴ It seems that the section of the code controlling as to bringing in new parties,⁵ is controlling in determining whether a demurrer for defect of parties is well taken.⁶ This phrase does not include the misjoinder of an improper party.⁷ Defect means too few, not too many.⁸ It is not within the office of a demurrer to state objections not apparent upon the face of the complaint,—e. g., to name parties who should have been joined,—and no conclusion is to be drawn from such statements adverse to the plaintiff.⁹ Unless objection be taken by demurrer the defect is waived. Thus, where some of the part owners of a vessel sued to recover freight, and the complaint showed that the plaintiffs owned three-eighths of the vessel only, and claimed to recover only their proportion of the freight money averred to be due, it was held that although all the owners should have joined in the action, yet the defendant had waived the objection by omitting to demur to the complaint.¹⁰

Objections necessary parties not joined can be taken,—and if not thus taken are waived,—by demurrer or answer only in California,¹¹ Colorado,¹² New York,¹³ and per-

6 Hill (N. Y.) 33, 38, 40 Am. Dec. 378; Burgess v. Abbott, 6 Hill (N. Y.) 135, affirming 1 Hill 476; Scofield v. Van Syckle, 23 How. Pr. (N. Y.) 97; Taylor v. Richards, 22 N. Y. Super. Ct. Rep. (9 Bosw.) 679.

4 Brainard v. Jones, 11 How. Pr. (N. Y.) 569; Scofield v. Van Syckle, 23 How. Pr. (N. Y.) 97.

5 See Kerr's Cyc. Cal. Code Civ. Proc., 2d ed., § 389; Consolidated Supp. 1906-1913, p. 1420; N. Y. Code Civ. Proc., § 122.

See, also, discussion and authorities, ante, §§ 639, 647-650.

6 Wallace v. Eaton, 3 N. Y. Code Rep. 161, 5 How. Pr. 99.

7 Great Western Compound Co. v. Ætna Ins. Co., 40 Wis. 373.

8 Bennett v. Preston, 17 Ind. 291.

9 Coe v. Beckwith, 31 Barb. (N. Y.) 339, 10 Abb. Pr. 296, 19 How. Pr. 398.

10 Merritt v. Walsh, 32 N. Y. 685, followed in Donnell v. Walsh, 33 N. Y. 43, 88 Am. Dec. 361, and Learned v. Castle (Cal.) 4 Pac. 191, 67 Cal. 41, 7 Pac. 34, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11.

11 Rowe v. Bacigalluppi, 21 Cal. 633; Heinlen v. Hilborn, 71 Cal. 557, 12 Pac. 673.

12 Fitzgerald v. Burke, 14 Colo. 559, 23 Pac. 993.

13 Creed v. Hartman, 29 N. Y.

haps elsewhere, and in South Dakota by demurrer or motion.¹⁴ Thus, for example, the nonjoinder of a co-partner as a plaintiff, which is not apparent upon the face of the complaint, can be taken advantage of by answer only; and if no objection is thus interposed the defect is waived.¹⁵

§ 937. ——— PARTIES DEFENDANT. Nonjoinder of parties defendant is a ground of demurrer in those cases only in which the defect is apparent upon the face of the complaint; when it does not so appear the vice can be reached by motion to bring in new parties necessary to the determination of the cause before the court.¹ Where there is a defect of parties, it must appear that the party demurring has an interest in having such other party made a defendant,² or that he is prejudiced by the nonjoinder;³ and where several parties are joined as plaintiffs, and the issues tendered are simple, a demurrer for multifariousness will not be sustained.⁴ Demurrer for nonjoinder of state in action against town commissioners will be sustained.⁵ So also for nonjoinder of corporation in suit against directors for embezzlement of its assets.⁶ If the corporation is not made a defendant to a creditor's bill to collect unpaid subscriptions, and the

^{591.} 86 Am. Dec. 341; *Lee v. Wilkes*, 19 Abb. Pr. (N. S.) 355, 27 How. Pr. 336.

See, also, post, § 938, footnote 3.

¹⁴ *Sykes v. First Nat. Bank*, 2 S. D. 242, 49 N. W. 1058.

In North Dakota also.—See *Van Gordon v. Goldamer*, 16 N. D. 331, 113 N. W. 612.

¹⁵ *Conklin v. Barton*, 43 Barb. (N. Y.) 435.

¹ As to who are necessary parties to the determination of a cause, see, ante, § 639.

As to method of bringing in new parties, see, ante, §§ 647-650.

² *Wooster v. Chamberlin*, 28 Barb. (N. Y.) 602; *Newbold v. Warrin*, 14 Abb. Pr. (N. Y.) 80; *Hillman v. Hillman*, 14 How. Pr. (N. Y.) 460.

³ *Stockwell v. Wager*, 30 How. Pr. (N. Y.) 271.

⁴ *People v. Morrill*, 26 Cal. 336.

⁵ *Plumtree v. Dratt*, 41 Barb. (N. Y.) 333.

⁶ *Gardiner v. Pollard*, 23 N. Y. Super. Ct. Rep. (10 Bosw.) 674.

objection is not set up by demurrer or answer, it is waived.⁷

§ 938. ——— OBJECTION TAKEN HOW AND WHEN. Although a demurrer to the answer reaches back to the complaint, a defect of parties can not be taken advantage of in that way. A demurrer to the complaint must be filed.¹ An allegation in an answer that the debt sued for, if due at all, is due to plaintiff and another as partners, can not be treated as a demurrer.² The objection to a defect of parties in the complaint, if apparent upon its face, should be taken advantage of by demurrer, or it must be deemed to have been waived at the trial.³ Thus in an action for the distribution of a fund by a trustee, the absence of necessary parties plaintiff, though demurrable at the time, is a defect cured by failure to respond.⁴

§ 939. ——— STATING GROUNDS OF OBJECTION. It has already been observed that in taking objections to a complaint under this subdivision of the code section the

⁷ Henderson v. Turngren, 9 Utah 432, 35 Pac. 495.

¹ McEwen v. Hussey, 23 Ind. 395.

² Andrews v. Mokelumne Hill Co., 7 Cal. 330; Williams v. Southern Pac. R. Co., 110 Cal. 457, 461, 42 Pac. 974.

One member of firm may recover the whole amount due the firm, unless the defendant pleads the non-joinder, and the plaintiff can not be nonsuited merely because a partnership demand is proven instead of an individual demand due the plaintiff.—Williams v. Southern Pac. R. Co., 110 Cal. 457, 461, 42 Pac. 974.

³ CAL.—Alvarez v. Brannan, 7 Cal. 503, 68 Am. Dec. 274; Dunn v. Tozer, 10 Cal. 167, 170; Burroughs v. Lott, 19 Cal. 125; Barber

v. Reynolds, 33 Cal. 497; Williams v. Southern Pac. R. Co., 110 Cal. 457, 461, 42 Pac. 457. MO.—Soeding v. Bartlett, 35 Mo. 90. N. Y.—Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551; Palmer v. Davis, 28 N. Y. 242; Robinson v. Smith, 3 Pai. Ch. 222, 24 Am. Dec. 212; Dillaye v. Parks, 31 Barb. 132; Tremper v. Conklin, 44 Barb. 456; affirmed, 44 N. Y. 58; Higgins v. Freeman, 9 N. Y. Super. Ct. Rep. (2 Duer) 650; Wright v. Storrs, 19 N. Y. Super. Ct. Rep. (6 Bosw.) 600; affirmed, 32 N. Y. 691. N. D.—Van Gordon v. Goldamer, 16 N. D. 331, 113 N. W. 612.

See, ante, § 936, footnote 13.

See, also, note, 64 Am. Dec. 561.

⁴ General Mut. Ins. Co. v. Benson, 12 N. Y. Super. Ct. Rep. (5 Duer) 168.

specific grounds of objection must be pointed out; it not being sufficient to plead the objection in the language of the statute;¹ that is to say, a demurrer under this subdivision following the words of the code, that there is a defect of parties defendant, is insufficient for not specifying the particular defect.² It must show who are the proper parties from the facts stated in the complaint; not indeed by name, for that might be impossible; but in such a manner as to point out to the plaintiff the objection to his complaint, and to enable him to amend by making proper persons parties defendant.³

§ 940. ——— MISJOINDER OF PARTIES — IN GENERAL. In those cases in which the facts showing a misjoinder of parties plaintiff or defendant do not appear on the face of the complaint so that the objection can not be raised as an issue at law by demurrer, as provided by statute, such facts may be pleaded by answer.¹

§ 941. ——— PARTIES PLAINTIFF. A misjoinder of parties plaintiff is a ground of demurrer under the California procedural code,¹ but not under that of Kansas,² or Oklahoma,³ which follows Kansas in matters of pleading. It is not ground for nonsuiting such plaintiffs as are entitled to recover.⁴ Thus the misjoinder of husband and wife must be taken advantage of on demurrer.⁵

¹ See, ante, § 935.

² *Skinner v. Stuart*, 13 Abb. Pr. (N. Y.) 442; reversed on another point, 39 Barb. 206, 15 Abb. Pr. 391, 24 How. Pr. 489.

³ *Robinson v. Smith*, 3 Pal. Ch. (N. Y.) 222, 24 Am. Dec. 212; *Dias v. Bauchaud*, 10 Pal. Ch. (N. Y.) 445; reversed on another point, 1 N. Y. 201, affirming 3 Edw. Ch. 485.

See, Story's Eq. Pl. (9th ed.), § 543.

¹ *Fulwider v. Trenton Gas Light & Power Co.*, 216 Mo. 582, 116 S. W. 508, 510, citing Mo. Rev.

Stats. 1899, § 598, Ann. Stats. 1906, p. 624.

¹ See, ante, § 912, subd. 4.

² *Atchison, T. & S. F. R. Co. v. Huitt*, 1 Kan. App. 788, 41 Pac. 1051.

³ *Stiles v. Guthrie, City of*, 3 Okla. 26, 41 Pac. 383.

⁴ *Rowe v. Bacigalluppi*, 21 Cal. 633; *Learned v. Castle* (Cal.), 4 Pac. 191, 67 Cal. 41, 7 Pac. 34, 78 Pac. 454, 18 Pac. 872, 21 Pac. 11; *White v. Delschneider*, 1 Ore. 254.

⁵ *Tissot v. Throckmorton*, 6 Cal. 471; *Dunderdale v. Grymes*, 16

The objection that too many parties are joined as plaintiffs must be taken advantage of by demurrer, if it appear on the face of the complaint, and if it does not so appear by answer, or the same is waived.⁶ Denial does not raise issue of misjoinder of plaintiffs. Where two are joined as plaintiffs in an action for the recovery of possession of land, a denial in the answer that the plaintiffs were in possession of the land does not present the issue of a misjoinder of either of the plaintiffs.⁷ Nor can the question of a misjoinder of the parties be raised under a demurrer, interposed upon the ground that the complaint does not state facts sufficient to constitute a cause of action.⁸ Where plaintiffs offer to strike out such parties demurred to, and defendant successfully resists, it was held that such action on the part of defendants is a waiver of misjoinder.⁹

§ 942. ——— PARTIES DEFENDANT. The misjoinder of parties defendant, under the California procedural code and codes having like provisions, is a ground of demurrer equally with the misjoinder of parties plaintiff. In those cases in which a codefendant claims that he is an unnecessary party to the action, he must demur to the petition on the ground of misjoinder of parties defendant; he can not, in the course of the trial, move that his name be stricken out,¹ because by failing to demur he waives the ground of objection.² But the defect, to be available on demurrer, must appear from the face of the

How. Pr. (N. Y.) 195; Aogadro v. Ball, 4 E. D. Smith (N. Y.) 384; Bartow v. Draper, 12 N. Y. Super. Ct. Rep. (5 Duer) 130.

⁶ Gillam v. Sigman, 29 Cal. 637, 640; Hastings v. Stark, 36 Cal. 126; Trenor v. Central Pac. R. Co., 50 Cal. 222, 231; Tennant v. Pfister, 51 Cal. 511, 513; Heinlen v. Hellborn, 71 Cal. 557, 561, 12 Pac. 673; Gruhn v. Stanley, 92 Cal. 86, 88,

28 Pac. 56; Farncomb v. Stern, 18 Colo. 279, 283, 32 Pac. 612; Bibb v. Allen, 149 U. S. 481, 504, 37 L. Ed. 819, 828, 13 Sup. Ct. Rep. 950.

⁷ Gillam v. Segman, 29 Cal. 637.

⁸ Tennant v. Pfister, 51 Cal. 511.

⁹ Summers v. Farish, 10 Cal. 347.

¹ Soeding v. Bartlett, 35 Mo. 90.

² See, ante, § 877.

complaint; where nothing appears on the face of the complaint to indicate a misjoinder of defendants a demurrer does not lie for such cause.³

Two causes of action joined in the same complaint, it has been said that a demurrer to the complaint, upon the ground that all of the defendants are not affected by both causes, lies at the instance of a defendant not effected. The objection is not, however, to the misjoinder of parties, but of causes of action, and the rule that a defendant against whom a good cause of action is pleaded may not demur because too many are joined, does not apply.⁴

Executor of an indorser of a promissory note, who as such executor is sued, together with the maker, can not demur to the complaint in such action for a misjoinder of defendants, if the complaint states facts sufficient to constitute a cause of action against him in his representative character.⁵

§ 943. ——— FORM OF DEMURRER. The question of misjoinder of parties can not be raised by general demurrer.¹ An objection for misjoinder of parties must be presented in the form of a special demurrer,² specifying wherein the alleged misjoinder consists; it is insufficient to allege the vice in the language of the statute merely.³ A demurrer to a complaint on the ground “that the complaint does not state facts sufficient to constitute a cause of action,”⁴ and which then specifies that the complaint shows no joint cause of action in the plaintiff,

³ Pierson v. Fuhrmann, 1 Colo. App. 187, 27 Pac. 1015; Preshaw v. Dee, 6 Utah 360, 23 Pac. 763.

⁴ Nichols v. Drew, 94 N. Y. 22.

⁵ Churchill v. Tropp, 3 Abb. Pr. (N. Y.) 306.

See, also, discussion and authorities, ante, §§ 634-639, and § 942, especially § 657.

¹ Tennant v. Pfister, 51 Cal. 511,

513; Ross v. Page, 11 N. D. 458, 460, 92 N. W. 822.

² Stevens v. Fitzpatrick, 218 Mo. 708, 118 S. W. 51, 55, citing Mo. Rev. Stats. 1899, § 598, Ann. Stats. 1906, p. 624.

³ O’Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269.

⁴ Rollins v. Forbes, 10 Cal. 299; Andrews v. Shaffer, 12 How. Pr.

and that it prays for a judgment in favor of three plaintiffs for an injury done to one, is a good demurrer for misjoinder of parties.⁵

*Under New York procedural code,*⁶ an objection that one of the plaintiffs has no right of action can no longer be taken under a demurrer merely for not stating facts sufficient to constitute a cause of action. In order to raise such objection, the demurrer must be for misjoinder of plaintiffs, specifying the plaintiff who, as contended by the defendant, has no cause of action.⁷

Under Oregon procedural code, where too many parties are brought in, a demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action, in favor of or against the improper parties, would be the proper remedy.⁸

§ 944. — 5. MISJOINDER OF CAUSES OF ACTION: FAILURE TO SEPARATELY STATE—IN GENERAL. At common law, legal and equitable causes of action could not be joined. It is otherwise in California and all the Pacific Coast states and territories, as well as in New York, Ohio, Iowa, and other states which have adopted codes of procedure.¹ The causes of action should be separately stated.²

(N. Y.) 441, 443; *Beale v. Hayes*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 640; *Bishop v. Edmiston*, 16 Abb. Pr. (N. Y.) 466; reversed on another point, 16 Abb. Pr. 466; *Emery v. Pease*, 20 N. Y. 62; *Hecker v. De Groot*, 15 How. Pr. (N. Y.) 314; *Moran v. Anderson*, 1 Abb. Pr. (N. Y.) 288; *Price v. Brown*, 10 Abb. N. C. (N. Y.) 67, 60 How. Pr. 511; *Woodgate v. Fleet*, 9 Abb. Pr. (N. Y.) 222; *Howard v. Seattle Nat. Bank*, 10 Wash. 280, 38 Pac. 1040, 39 Pac. 100.

⁵ *Poett v. Stearns*, 28 Cal. 226.

⁶ New York Code of Civil Procedure, §§ 488, 490.

⁷ *Berney v. Drexel*, 33 Hun

(N. Y.) 419, affirming 63 How. Pr. 471.

⁸ *Cohen v. Ottenheimer*, 13 Ore. 220, 10 Pac. 20.

¹ *Kerr's Cyc. Cal. Code Civ. Proc.*, §§ 307, 427; *Biennial Supp.* 1915, p. 3065.

Complaint in ejectment may also pray injunction against waste. — *Natoma Water & Min. Co. v. Clarkin*, 14 Cal. 544, 547; *Colorado Eastern R. Co. v. Chicago, B. & Q. R. Co.*, 73 C. C. A. 147, 141 Fed. 898; *Waskey v. McNaught*, 90 C. C. A. 289, 163 Fed. 933.

² *Id.*, § 427; *Natoma Water & Min. Co. v. Clarkin*, 14 Cal. 544, 547; *Boles v. Cohen*, 15 Cal. 152,

Leading and distinguishing principle of the California procedural code, and other procedural codes and statutes, is that litigation must not be conducted by piecemeal, and whenever the differences between the parties arise out of (1) the same transaction; (2) out of many transactions of like character; (3) where all require the same place of trial, and (4) when but one kind of relief is prayed for, so that one writ will afford the remedy, a demurrer will not be sustained under this subdivision. By one kind of relief is meant ultimate relief. A remedy at law and equitable relief may be asked for in the same complaint. Thus, A may sue B for trespass, and in the same complaint show that the acts of trespass are irreparable, and ask for an injunction.³ The writ of injunction is not in such a case asked for as the ultimate writ in the case, nor for the reason that it will afford the whole of the remedy, but as a protection of the subject-matter of the action pending the litigation. So allegations of fraud in support of the cause of action, and not as constituting a separate cause, do not make improper joinder of actions.⁴ If, in fact, the complaint contains but a single cause of action, although a part of the facts constituting it are set forth, some in one count as constituting one cause of action, and some in another as constituting a separate cause of action, the defendant can not successfully demur on the ground that the causes of action are improperly united.⁵

§ 945. ——— DEMURRER LIES WHEN—IN GENERAL. In those cases in which it appears from the face of the complaint that there is a misjoinder of causes of action, the

76 Am. Dec. 468; *Smith v. Smith*, 80 Cal. 323, 324, 21 Pac. 4, 22 Pac. 186, 549.

³ *Gates v. Kieff*, 7 Cal. 124; *Marius v. Bicknell*, 10 Cal. 224; *Weaver v. Conger*, 10 Cal. 237; *More v. Massini*, 32 Cal. 594, 596;

Hughes v. Dunlap, 91 Cal. 385, 390, 27 Pac. 642.

⁴ *Meyer v. Van Collem*, 28 Barb. (N. Y.) 230, 7 Abb. Pr. 222; *Campbell v. Wright*, 21 How. Pr. (N. Y.) 9.

⁵ *Hillman v. Hillman*, 14 How. Pr. (N. Y.) 456.

objection must be taken by demurrer, and can not be raised for the first time on appeal.¹ Such misjoinder can not be remedied by a motion to strike out part of the pleading.² A general demurrer to a whole complaint which contains two counts or two causes of action is properly sustained, where neither of the counts states a cause of action, and it is unnecessary that the demurrer in such case should refer to either of the counts separately.³ A cause of action for costs incurred in having to bring suit against the defendant for specific performance of an agreement to reconvey certain premises; a cause of action based upon alleged fraud, malice, and oppression of the defendant, and a cause of action arising from the breach of the defendant's written covenant of warranty of property conveyed to the plaintiff, can not be united. And a complaint which unites and mingles together such causes of action is demurrable, on the ground that several causes of action are improperly united.⁴ But in a suit in equity to set aside a money judgment, the complaint stated a variety of circumstances differing in their nature, but connected with and tending to establish the alleged fraud, and it was held that the complaint was not demurrable for a misjoinder of causes of action.⁵

§ 946. ——— CONVERSION OF CHATTELS — DAMAGES AND RESTITUTION. Where the complaint alleged that defendant had become possessed of a chattel, the property of plaintiff, and wrongfully converted it to his, de-

¹ *Gale v. Tuolumne County Water Co.*, 44 Cal. 43, 45; *Roberts v. Eldred*, 73 Cal. 394, 15 Pac. 16; *Tatum v. Rosenthal*, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136; *Redfield v. Oakland Consol. Street R. Co.*, 110 Cal. 277, 42 Pac. 822; *Kippen v. Ollason*, 136 Cal. 640, 642, 69 Pac. 293; *Conde v. Dreisani Gold Min. Co.*, 3 Cal. App. 583, 590, 86 Pac. 825, 828; *Brahoney v. Denver, U. & P. R. Co.*, 14 Colo. 27,

23 Pac. 172; *Keys v. Morrison*, 3 Colo. App. 441, 34 Pac. 259; *Moore v. Vickers*, 3 Colo. App. 443, 34 Pac. 257.

² *Eversdon v. Mayhew*, 85 Cal. 1 21 Pac. 431, 24 Pac. 382.

³ *Churchill v. Pacific Imp. Co.*, 96 Cal. 490, 31 Pac. 560.

⁴ *Cosgrove v. Flisk*, 90 Cal. 75, 27 Pac. 56.

⁵ *Raynor v. Mintzer*, 67 Cal. 159, 7 Pac. 431.

fendant's use, and then demanded damages for such taking and detention, and a restitution of the chattel, it was held demurrable for improper joinder of causes of action.¹ The objection must be specially assigned as the cause of demurrer.²

§ 947. — — — — — CLAIM SUED IN DEBT—FRAUDULENT CONVEYANCE. The plaintiff having a claim against A brought suit against him to enforce the claim, and, in the same action, sought to set aside a conveyance of real estate from A to B, on the ground that it was executed in fraud of the creditors of A, and made B a party to the suit; it was held, there having been no objection taken, either by demurrer or answer, on the ground of an improper joinder of several causes of action, that the plaintiff was entitled to contest the validity of the conveyance from A to B.¹ The demurrer must be entirely sustained, or fail to the whole extent to which it is applied.²

§ 948. — — — — — HUSBAND AND WIFE — P R A Y E R AGAINST HUSBAND ONLY. There is no misjoinder of actions in an action against husband and wife to foreclose a mortgage executed by husband and wife to secure a note given by the husband alone, where the prayer of the complaint was for judgment against the husband, and a decree against the husband and wife for a sale of premises.¹

§ 949. — — — — — INJURIES TO THE PERSON — INJURIES TO THE PROPERTY. Under the express provisions of

¹ Maxwell v. Farnham, 7 How. Pr. (N. Y.) 236.

² Washington v. Eames, 88 Mass. (6 Allen) 417.

¹ Macondray v. Simmons, 1 Cal. 393.

Case criticised and refused to follow as a precedent.—Thompson v. Caton, 3 Wash. Tr. 31, 36, 13 Pac. 185.

² Waite v. Ferguson, 14 Abb. Pr. (N. Y.) 379; Peabody v. Washington County Mut. Ins. Co., 20 Barb. 339, 342; People v. New York, City of, 28 Barb. (N. Y.) 240, 8 Abb. Pr. 7, (7 How. Pr. 56); reversed on another point in 10 Abb. Pr. 111; Cook v. Chase, 10 N. Y. Super. Ct. Rep. (3 Duer) 643.

¹ Rollins v. Forbes, 10 Cal. 299.

the California procedural code, in the section regulating the joinder of causes of action,¹ as it stood prior to the amendment of 1915,² a cause of action for an injury to the person could not be joined in the same complaint with a cause of action for injury to the property, even where the causes of action both arise out of the same transaction or tortious act. That is to say, if your neighbor kept a vicious dog, well knowing it to be vicious and dangerous, and while you were passing along the public highway that dog bit you, seriously injuring and wounding your leg, and at the same time tearing your trousers-leg and ruining your trousers, you would have a cause of action against the owner of the dog (1) under subdivision six of the statute,³ for the injury to your leg, and (2) under subdivision seven of the statute,⁴ for the injury to your trousers; but these two causes of action, belonging to different classes in the statutory enumeration of the classes of action that can be joined, was within the inhibition to the joining of causes of action belonging to different classes of action. Thus, under this statute, a complaint alleging that by the wrongful acts of the defendants (1) the plaintiff's property was damaged, (2) her character was injured, and (3) her health permanently impaired, was said to contain three distinct causes of action for which the plaintiff was entitled to recover damages; but the complaint was held demurrable because it united causes of action belonging to different classes of action under the statute.⁵ The same rule prevails in all those jurisdictions having statutes similar to the California statute prior to the amendment of 1915.⁶

¹ Kerr's Cyc. Cal. Code Civ. Proc., § 427, and also under the amendment of 1913, Consolidated Supp. 1906-1913, p. 1449.

² Kerr's Cyc. Cal. Biennial Supp. 1915, p. 3065.

³ See Statutes cited in footnote 1, this section.

⁴ Id.

⁵ Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56.

⁶ See note 2, this section.

See full discussion of this subject and collection of authorities, 50 L. R. A. 161-167; 36 L. R. A. (N. S.) 240.

Amendment of 1915 to the California procedural code adds a proviso especially permitting causes of action (1) for injuries to the person and (2) for injuries to the property, growing out of the same tort, to be joined in the same complaint, and they need not be stated separately.⁷ The rule under the amendment will be that prevailing in Minnesota,⁸ in early New York cases,⁹ and perhaps elsewhere; with the result that if an action is brought for a tortious injury to the person without joining a claim for the injury to the property by the same tortious act, an action on the omitted item or cause of action will be barred, under the rule preventing the splitting up of demands,¹⁰ although there are cases to the contrary.¹¹

Damages for a personal tort can not be united with claim for equitable relief.¹² Likewise a claim for possession of real property and damages for its detention can

⁷ Kerr's Cyc. Cal. Biennial Supp. 1915, p. 3065.

In New York required to be separately stated and numbered.—Powers v. Sherin, 89 App. Div. (N. Y.) 37, 85 N. Y. Supp. 89.

⁸ King v. Chicago, M. & St. P. R. Co., 80 Minn. 83, 81 Am. St. Rep. 238, 50 L. R. A. 161, 82 N. W. 1113.

⁹ Grogan v. Lindeman, 1 N. Y. Code R. (N. S.) 287.

Later New York cases, and cases elsewhere, are to the effect that there are two distinct causes of action, and a recovery on one does not bar a recovery on the other.—Eagan v. New York Transp. Co., 39 Misc. (N. Y.) 112, 78 N. Y. Supp. 209.

Joinder in one complaint, though separately set out, held demurrable in Vock v. Auterbourn, 66 Misc. 222, 122 N. Y. Supp. 1023.

But see Powers v. Sherin, 89 App. Div. 37, 85 N. Y. Supp. 89.

¹⁰ See Wilson Co., H. W., v. Farnham & Co., A. B., 97 Minn. 157, 106 N. W. 342; Kimball v. Louisville & N. R. Co., 94 Miss. 405, 48 So. 230; Ochs v. Public Service R. Co., 80 N. J. L. 150, 77 Atl. 533.

¹¹ Reilly v. Silician Asphalt Pav. Co., 170 N. Y. 40, 43, 88 Am. St. Rep. 636, 57 L. R. A. 176, 62 N. E. 772; Ochs v. Public Service R. Co., 81 N. J. L. 663, Ann. Cas. 1912D, 255, 36 L. R. A. (N. S.) 242, 80 Atl. 495.

¹² Mayo v. Madden, 4 Cal. 27; Benson v. Beatty, 70 Kan. 295, 78 Pac. 847; Wilcox v. Saunders, 4 Neb. 581.

Equitable relief may be asked in action for trespass.—Gates v. Keiff, 7 Cal. 126.

Compare: Post, § 953.

not be united with a claim for consequential damages;¹³ and a claim for damages resulting from a trespass quare clausum fregit can not be joined with ejectment. Where several matters are united against one defendant, perfectly distinct and unconnected, or where relief is demanded against several defendants in matters of a distinct and independent nature, the complaint is vulnerable on demurrer.¹⁴

§ 950. ——— MANDAMUS AND INJUNCTION —
CONTINUOUS STATEMENT OF FACTS. Although the complaint in an action may be an attempt to improperly join a cause of action for mandamus and one for injunction, yet a demurrer for misjoinder will not lie, provided the complaint, which is not separated into separate counts or causes of action, but is a continuous statement of facts, states a good cause of action for the injunction and shows no ground for relief by mandamus.¹

§ 951. ——— PENALTIES — SEPARATE OFFENSES. In actions to recover statutory penalties, different offenses for which penalty incurred can not be united in one complaint, even though separately stated and numbered; and where so united demurrer for misjoinder of causes of action will be sustained. Thus, a plaintiff can not unite in his complaint two or more causes of action for penalties incurred by a toll-gatherer for demanding and receiving too much toll from the plaintiff on different occasions, even if they are separately stated.¹ On the other hand, it has been held that causes of action to recover the penalty of the money paid as usurious interest, although paid at different times and on different

¹³ Bowles v. Sacramento Turnpike Co., 5 Cal. 224.

¹⁴ Wilson v. Castro, 31 Cal. 420; Stewart v. Smith, 6 Cal. App. 157, 91 Pac. 669.

¹ Times Publishing Co. v. Ever-

ett, City of, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. 695.

¹ Brown v. Rice, 51 Cal. 489; Louisville & N. R. Co. v. Commonwealth, 102 Ky. 300, 53 L. R. A. 149, 43 S. W. 458.

contracts, may be united in the same complaint.² This holding is based on the ground (1) that when the plaintiff paid to the defendant interest in excess of the amount allowed by law there arose on the part of the defendant an obligation tantamount to a promise to repay to the plaintiff the amount of money thus unlawfully exacted as interest, and (2) in addition thereto the law imposed an obligation on the defendant to repay to the plaintiff an amount of money equal to the usurious interest exacted. The court held that this obligation was enforceable, under the procedural code of Alaska, when pleaded as a promise to pay, just as at common law assumpsit lay on an implied promise to discharge a legal obligation created by statute.³

§ 952. ———— RECOGNIZANCE SUED ON—APPLICATION OF PROPERTY UNDER TRUST DEED. In a case in which a suit was brought on a recognizance given before a justice for the appearance of defendant A to answer a criminal charge, the complaint, after setting out the cause of action on the recognizance, alleged that the defendant A, to secure his sureties, executed a deed of trust to B of certain warrants and money; that this deed provides that in case the recognizance be forfeited and the sureties become liable thereon, the trustee is to apply the property to the payment, so far as it will go, of the recognizance. The complaint asked to have this property so applied. It was held that a demurrer for misjoinder of causes of action lies; that the trust deed has nothing to do with the liability of the sureties.¹

§ 953. ———— SEPARATE LIENS FOR ASSESSMENTS OR TAXES—JOINDER ERROR. In those cases in which there

² Washington-Alaska Bank v. Hillsborough County v. London-Stewart, 108 C. C. A. 273, 184 Fed. derry, 43 N. H. 451; Brookline v. 673. Westminster, 4 Vt. 224; Bell v.

³ Citing Baltimore, City of, v. Burroes. Bull. N. P. 129.

Howard, 6 Har. & J. (Md.) 383, ¹ People v. Skidmore, 17 Cal. 294; Bath v. Freeport, 5 Mass. 325; 260.

are two or more separate assessments for the improvement of a street, made upon a single lot at different times, the work of improvement being done under separate and distinct contracts, a complaint to foreclose the lien of the assessments which unites the causes of action under each assessment, is vulnerable to a demurrer under this section of the statute, because of the improper joinder of causes of action.¹ And the same has been said to be true in an action to enforce tax-liens for taxes covering different periods, and the cause of action for the respective periods can not be joined in the same complaint.²

§ 954. ——— SHERIFF SUED IN CASE — TROVER AND CONVERSION. Where in an action against the sheriff the plaintiff's declaration contained one count in case against him as sheriff, for so negligently executing the writ as to cause plaintiff to lose his debt, and another in trover and conversion, against him individually for the value of the goods, such joinder is not error, for they are both actions on the case, the plea and judgment being the same in each; and the demurrer of the defendant to the declaration, on the ground of misjoinder, was properly overruled.¹ But where a complaint against a sheriff and his official bondsmen alleges only a cause of action against him as a trespasser, and against his sureties as signers of the bond, and not otherwise, the complaint is demurrable.²

§ 955. ——— TRESPASS—DAMAGES AND VALUE OF PROPERTY. In an action for trespass, where the value of the property and damages were claimed, it was held that demurrer would not lie for misjoinder of actions.¹

¹ Dyer v. Barstow, 50 Cal. 652.

585; Hoyce v. Raymond, 25 Kan.

² State v. Yellow Jacket Silver Min. Co. 14 Nev. 220, 240.

667; Sanders v. Cline, 22 Okla. 164; 101 Pac. 271.

¹ Patterson v. Anderson, 40 Penn. St. 359, 80 Am. Dec. 579.

¹ Tendersen v. Marshall, 3 Cal. 440. See Dunton v. Niles, 95 Cal.

² Ghirardelli v. Bourland, 32 Cal.

494, 30 Pac. 762.

§ 956. ——— CAUSE OF ACTION NOT SEPARATELY STATED.

It seems that in many of the states a demurrer does not lie to a complaint under this subdivision, for the defect of not separately stating two or more causes of action, they being such as might be united in one complaint if properly stated. In New York,¹ in Missouri,² and formerly in Ohio,³ the remedy in such case is by motion.

In California the cases are divided on the question whether demurrer would lie,⁴ or the remedy was by motion,⁵ prior to the adoption in 1907 of the amendment;⁶ since that amendment the proper method of objecting that two or more separate causes of action in a complaint are not separately stated, is by demurrer.

§ 957. ——— JOINT DEMURRER — WHEN SUFFICIENT.

In those cases in which the complaint states a cause of action against one, or some of several defendants, a joint demurrer can not be sustained.¹ Thus, in an action against the plaintiff in an injunction suit and the sureties on the injunction bond, a second count in the complaint suf-

¹ *Lattin v. McCarty*, 8 Abb. Pr. (N. Y.) 225, 17 How. Pr. 239; reversed on another point in 41 N. Y. 107; *Badger v. Benedict*, 4 Abb. Pr. (N. Y.) 176; affirmed, 1 Hill. 414; *Fickett v. Brice*, 22 How. Pr. (N. Y.) 194, 195; *Cheney v. Fisk*, 22 How. Pr. (N. Y.) 236; *Hassen v. Bayaud*, 12 N. Y. Super. Ct. Rep. (5 Duer) 656.

² *State v. Davis*, 35 Mo. 406.

³ *Hartford Township v. Bennett*, 10 Ohio 441.

⁴ *Buckingham v. Waters*, 14 Cal. 146; *Early v. Mannix*, 15 Cal. 150.

⁵ *Fraser v. Oakdale Lumber Co.*, 73 Cal. 187, 190, 14 Pac. 829; *Jacobs v. Lorenz*, 98 Cal. 332, 13 Pac. 119; *Carpet Beating, etc., Works v. Jones*, 102 Cal. 506, 36 Pac. 841; *Huene v. Cribb*, 9 Cal. App. 141, 98 Pac. 78.

⁶ Prior to enactment of amendment to section 430 of the California Code of Civil Procedure (Laws 1907, p. 706, c. 372 Kerr's Cyc. Cal. Consolidated Supp. 1906-1913, p. 1450), the objection that several causes of action were not separately stated could not be reached by demurrer.—*Huene v. Cribb*, 9 Cal. App. 141, 98 Pac. 78 (action to declare trust deed a mortgage, and to quiet title).

¹ *Asevado v. Orr*, 100 Cal. 293, 300, 34 Pac. 777; *Rogers v. Schulenburg*, 111 Cal. 281, 284, 43 Pac. 899; *Woodbury v. Sackrider*, 2 Abb. Pr. (N. Y.) 402; *People v. New York, City of*, 28 Barb. (N. Y.) 240, 8 Abb. Pr. 7, 17 How. Pr. 56; reversed on another point in 10 Abb. Pr. 111; *Philipps v. Hagadon*, 12 How. Pr. (N. Y.) 17;

ficiently stating a cause of action against the sureties, the first count stating a cause of action against the plaintiff in the injunction suit, a joint demurrer by all the defendants upon the grounds (1) that the complaint failed to state facts sufficient to constitute a cause of action; (2) that there was a misjoinder of parties defendant; and (3) that a cause of action upon the case was improperly joined with a cause of action upon a special contract, was held to have been properly overruled as to the sureties.² But where the complaint disclosed a separate cause of action against each defendant, a joint demurrer for misjoinder was sustained.³

§ 958. ——— OBJECTIONS TAKEN HOW AND WHEN—IN GENERAL. Objections to the misjoinder of causes of action should be taken by demurrer or answer, or they are deemed waived.¹ Misjoinder of actions can not be taken advantage of on general demurrer.² A misjoinder of causes of action in a complaint can not be taken advantage of, unless especially assigned by a demurrer.³ Where a plaintiff brought eleven qui tam actions for penalties against the same defendant, who demurred especially to each declaration, and the plaintiff joined in demurrer, a motion that one demurrer be argued, and that proceedings in the other cases be stayed to abide the event of the one argued, was denied. A party bringing a multiplicity of suits must take the responsibility of meeting them in

Eldridge v. Bell, 12 How. Pr. (N. Y.) 547, 549.

See Pomeroy's Remedies and Remedial Rights, § 577.

See, also, post, § 970.

² Asevado v. Orr, 100 Cal. 293, 300, 34 Pac. 777.

³ Hess v. Buffalo & Niagara Falls R. Co., 29 Barb. (N. Y.) 391.

¹ Kerr's Cyc. Cal. Code Civ. Proc., § 434. See: CAL.—Jacks v. Cooke, 6 Cal. 164; Marius v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257;

Marius v. Bicknell, 10 Cal. 217, 224. MASS.—Barlow v. Leavitt, 66 Mass. (12 Cush.) 483. N. Y.—Youngs v. Seely, 12 How. Pr. 395. ORE.—White v. Delschneider, 1 Ore. 254. UTAH—Wenner v. Smith, 4 Utah 238, 245, 246, 9 Pac. 293. WIS.—Jones v. Hughes, 16 Wis. 683.

² Ruhling v. Hackett, 1 Nev. 360.

³ Haverstick v. Trudel, 51 Cal. 431; Light v. Pressey, 18 Mont. 263, 278, 44 Pac. 983.

the usual way.⁴ If two causes of action have been improperly joined without properly stating them, the objection must be taken by demurrer, or it is considered waived.⁵ Where there is a misjoinder of causes of action, any defendant may demur; but where there is a joinder of improper parties as defendants, the defendant or defendants improperly joined can alone demur.⁶ In an equitable action, where the parties joined as plaintiffs are all interested in the principal question raised in the complaint, and the issues tendered are simple, and a multiplicity of suits may be avoided, a demurrer for multifariousness will not be sustained.⁷

§ 959. ——— BY GENERAL DEMURRER—NOT STATING GROUND OF OBJECTION. If a complaint containing several causes of action is demurred to, on the ground that the several counts do not state facts sufficient to constitute a cause of action, the demurrer must be overruled, unless all the statements are insufficient.¹ If there are several causes of action in the complaint, and a demurrer is interposed to one or more, but not to each, the defendant should take care to avoid a default as to the causes of action not demurred to. In such case he may stipulate

⁴ *Ferrett v. Atwill*, 1 Blackf. 151, Fed. Cas. No. 4747.

⁵ *Fuhn v. Weber*, 38 Cal. 636.

⁶ *Ashby v. Winston*, 26 Mo. 210.

⁷ *People v. Morrill*, 26 Cal. 336, 360; *Wilson v. Castro*, 31 Cal. 420, 427; *Baines v. West Coast Lumber Co.*, 104 Cal. 1, 8, 37 Pac. 767; *Fairbanks v. San Francisco & N. R. Co.*, 115 Cal. 579, 583, 47 Pac. 450; *Daly v. Ruddell*, 137 Cal. 671, 674, 70 Pac. 784; *Gillisple v. Gouly*, 152 Cal. 644, 93 Pac. 857; *California Raisin Growers' Assoc. v. Abbott*, 160 Cal. 606, 117 Pac. 770; *Toomey v. Knobloch*, 8 Cal. App. 587, 97 Pac. 530; *Garner v. Wright*, 28 How. Pr. (N. Y.) 92.

Action of tort against several, the rule is otherwise, and the wrong complained of must be joint.—*Keyes v. Little York Gold Washing & Water Co.*, 53 Cal. 724, 734.

¹ *Cooper v. Clason*, 1 N. Y. Code Rep. (N. S.) 347, 2 Edm. Sel. Cas. 320; *Jaques v. Morris*, 2 E. D. Smith (N. Y.) 639; *Martin v. Matison*, 8 Abb. Pr. (N. Y.) 3; *Newbery v. Garland*, 31 Barb. (N. Y.) 121; *Butler v. Wood*, 10 How. Pr. (N. Y.) 222; *Barbre v. Goodall*, 28 Ore. 465, 38 Pac. 67, 43 Pac. 378; *Townsend v. Jamison*, 48 U. S. (7 How.) 706, 716, 12 L. Ed. 880, 884, 885.

for time to answer such causes of action until the demurrer is disposed of to the other causes of action, or he may answer them at the same time that he files his demurrer. If there is ground of demurrer to the whole complaint, and a demurrer is interposed thereto, as there may be, notwithstanding there is one good cause of action, that would, of course, save any default being taken.

Where distinct causes of action,—e. g., upon a charge of slander,—are not separately stated, or not stated with sufficient certainty, these defects are waived by a general demurrer.² All objections to a complaint which are grounds of special demurrer are waived where the demurrer is general and no special grounds are specified therein.³

§ 960. ——— BY SPECIAL DEMURRER — STATING GROUNDS OF OBJECTION. A misjoinder of causes of action, or a failure to separately state causes of action, should be objected to by a special demurrer specifically pointing out the vice relied upon. A demurrer specifying generally (1) a misjoinder of parties plaintiff, and (2) a misjoinder of causes of action, in the language of the statute, is insufficient to raise the question of the improper joinder of the parties plaintiff; and if the objection of misjoinder of causes of action appears upon the face of the complaint it is waived by a failure to specify it as a ground of demurrer.¹ Where there are several causes of action, but of one of them the court has no jurisdiction, the demurrer must be to that one, and in this form, and not to the whole complaint, as for a misjoinder of actions.² A demurrer on the ground “that the court has no jurisdiction either of the person of the defendants or of the subject of the action,” and “that the complaint does not state facts sufficient to constitute a cause of action,”

² Clugston v. Garretson, 103 Cal. 441, 37 Pac. 469.

³ Daggett v. Gray, 110 Cal. 169, 42 Pac. 568.

¹ O’Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269.

² Cook v. Chase, 10 N. Y. Super. Ct. Rep. (3 Duer) 643.

is sufficiently explicit under the rule of construction adopted by the courts of California.³

In Idaho an objection to the jurisdiction of the court may be made at any time.⁴

In New York objection to the jurisdiction may be raised whenever the parties are before the court, either at Special Term, or by motion on the trial, or by motion in arrest after verdict.⁵

§ 961. ——— WAIVER OF OBJECTIONS. Objections on the ground that several causes of action have been improperly united, as well as on the ground of misjoinder of parties, must be taken by demurrer or otherwise in the trial court, or they are to be deemed waived.¹ And this rule applies as well to actions for forcible entry and detainer as to other civil actions.² A demurrer on the ground of misjoinder of causes of action is waived by pleading over.³ Error in overruling a demurrer for misjoinder of causes of action is immaterial if no injury resulted therefrom.⁴ Where two causes of action are improperly joined, failure of the court to pass upon a demurrer on that ground is not cured by sustaining a demurrer to one of the paragraphs for want of sufficient facts to state a cause of action.⁵ Where the complaint in a suit to foreclose a mechanics' lien is claimed to have improperly united two causes of action,—one for materials furnished to the agent and contractor, and the other

³ *Ellissen v. Hallock*, 6 Cal. 386; *Willis v. Farley*, 24 Cal. 491; *Kent v. Snyder*, 30 Cal. 666.

⁴ *Durant v. Comegys*, 2 Idaho (West Pub. Co. ed.) 809, 810, 26 Pac. 755.

⁵ *Burnham v. DeBevorse*, 8 How. Pr. (N. Y.) 160. See *Blacksmith v. Fellows*, 7 N. Y. 401; affirmed, 60 U. S. (19 How.) 366, 15 L. Ed. 684; *Gould v. Glass*, 19 Barb. (N. Y.) 179, 186; *Higgins v. Rock-*

well, 9 N. Y. Super. Ct. Rep. (2 Duer) 653.

¹ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 434.

² *Farncomb v. Stern*, 18 Colo. 279, 32 Pac. 612.

³ *Schoelkopf v. Leonard*, 8 Colo. 159, 6 Pac. 209.

⁴ *Angell v. Hopkins*, 79 Cal. 181, 21 Pac. 729.

⁵ *Penter v. Staight*, 1 Wash. 365, 25 Pac. 469.

for materials furnished the owner,—this defect, if it is one, was waived by failure to demur on that ground.⁶

§ 962. — 6. COMPLAINT NOT STATING FACTS CONSTITUTING CAUSE OF ACTION—IN GENERAL. This ground of demurrer on the part of the defendant is confined to those cases in which the complaint states no cause of action in favor of the plaintiff, or either of them, where two or more are joined as plaintiffs, against the defendant; and does not include those cases in which there is a misjoinder of parties apparent upon the face of the complaint,¹—in which latter case the demurrer must be under subdivision four of the statute;² because a complaint stating facts sufficient to entitle plaintiff to any relief, either at law or in equity, is not demurrable on this ground.³ The complaint must show a cause of action in the plaintiff against the defendant, or it will be vulnerable on demurrer; it is not sufficient that it show somebody has a cause of action against the defendant, or that the plaintiff has a cause of action against somebody.⁴ In all those cases in which the complaint is sufficient to support a judgment, it will be good as against a general demurrer on this ground.⁵

§ 963. — — — DEMURRER ADMITS WHAT. Demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, admits all the facts that are well and properly pleaded,¹ and also the validity of the statute authorizing plaintiff to sue.²

⁶ *Owings v. Turner*, 48 Ore. 462, 87 Pac. 160; *Bohn v. Wilson*, 53 Ore. 490, 101 Pac. 202, 204, citing *Bel. & Cot. Comp. Laws*, § 72.

¹ *Summers v. Farish*, 10 Cal. 347, 350.

² See, ante, §§ 935-943.

³ *Poett v. Stearns*, 28 Cal. 226, 228; *White v. Lyons*, 42 Cal. 279, 282; *Mora v. Le Roy*, 58 Cal. 8, 11; *McPherson v. Weston*, 64 Cal. 275, 280, 30 Pac. 842; *Hulsman v. Todd*, 96 Cal. 228, 230, 31 Pac. 39;

Whitehead v. Sweet, 126 Cal. 67, 73, 58 Pac. 376; *Jones v. Iverson*, 131 Cal. 101, 104, 63 Pac. 135; *Swan v. Talbot*, 152 Cal. 144, 94 Pac. 238.

See, also, post, § 970.

⁴ *Dixon v. Cordozo*, 106 Cal. 506, 507, 39 Pac. 857.

⁵ *Lawrence Nat. Bank v. Kowalsky*, 105 Cal. 41, 43, 38 Pac. 517.

¹ See, ante, § 872, footnote 7.

² *Litchfield v. McComber*, 42 Barb. (N. Y.) 288.

§ 964. ——— DEMURRER'S EFFECT. A demurrer under this subdivision puts in issue the validity of the entire complaint.¹ And if it specifies certain allegations deemed essential, it excludes all other grounds of objections than those which are particularly set forth.² The statement that certain parts of the complaint are immaterial and redundant does not vitiate the demurrer.³ But defendants can not by demurrer refuse to grant a compensation which the demurrer admits the right of.⁴

§ 965. ——— ACTION COMMENCED IN WRONG COUNTY. The fact that an action was commenced in the wrong county is not a ground of demurrer. The defendant's remedy, in such a case, lies in an application to the court, on cause exhibited, to change the place of trial to the proper county.¹ Under Oregon procedural code, when a defendant wishes to challenge the authority of a court to try an action in replevin in the county in which such action is brought, unless it was alleged in the complaint that the property was taken in such county, he should distinctly specify that objection in his demurrer, and thereby call the attention of the court to the point he asked to have decided.²

§ 966. ——— ACTION PREMATURELY COMMENCED—OBJECTION TAKEN AT TRIAL. Where the action was premature, defendant may demur for insufficient facts.¹ The court will not presume, in support of the demurrer, that the debt was not due when action was commenced;² and

¹ White v. Brown, 14 How. Pr. (N. Y.) 282; Spear v. Downing, 34 Barb. (N. Y.) 523, 12 Abb. Pr. 442.	¹ Wasson v. Hoffman, 4 Colo. App. 491, 36 Pac. 445.
² Nellis v. De Forest, 16 Barb. (N. Y.) 61.	² McCarty v. Wintler, 17 Ore. 391, 393, 21 Pac. 195.
³ Smith v. Brown, 6 How. Pr. (N. Y.) 383.	¹ Hicks v. Branton, 21 Ark. 186; Harvey v. Chilton, 11 Cal. 114; Selz, Schwab & Co. v. Tucker, 10 Utah 132, 37 Pac. 249.
⁴ Selkirk v. Sacramento County, 3 Cal. 323. See Tuolumne County v. Chapman, 8 Cal. 397.	² Meynard v. Talcott, 11 Barb. (N. Y.) 569.

greater latitude of presumption may be indulged to sustain a complaint when the objection that it does not state a cause of action is taken for the first time at the trial, after an issue of fact has been taken upon it by answer, than when the same objection is taken by demurrer.³ In an action on a bond dated May 10, 1853, conditioned for the payment of a sum "in two years from the 1st day of April last, with annual interest," a demurrer, on the ground that no cause of action was stated, was tried in June, 1854. It was held that as interest was due before the time of trial, the plaintiff was entitled to judgment upon the demurrer. A demurrer is not the mode, under the New York Code, of raising the objection that the cause of action had not accrued when the action was commenced.⁴

§ 967. ——— ACTION FOUNDED ON FRAUD—FAILURE TO ALLEGE FACTS. In those cases in which the cause of action is based on fraud, a failure of the complaint to allege the facts showing the fraud claimed, renders it vulnerable to a demurrer on this ground.¹ A simple allegation of fraud is merely the allegation of the opinion or conclusion of the pleader, or of a conclusion of law, where the facts are not set out.²

§ 968. ——— AMENDED COMPLAINT—DEPARTURE FROM ORIGINAL COMPLAINT. The fact that an amended complaint departs from the cause of action set out in the

³ Johnson v. Burnside, 3 S. D. 230, 52 N. W. 1057.

Demurrer proper proceeding to test complaint, and a party, by omitting to demur and pleading to the merits, is not in a position to claim the indulgence of the court. If objection is taken to the complaint after answer, and the complaint is amendable under the statute (S. D. Comp. Laws, § 4938), permission to amend should be

given or the evidence received and the complaint subsequently amended to conform to the facts proved.—Johnson v. Burnside, 3 S. D. 230, 52 N. W. 1057.

⁴ Smith v. Holmes, 19 N. Y. 271.

¹ Cosgrove v. Fisk, 90 Cal. 75, 77, 27 Pac. 560. See Pehrson v. Hewitt, 79 Cal. 594, 21 Pac. 950.

² As to pleading conclusion of pleader, or conclusion of law, see, ante, §§ 714, 715.

original or other prior complaint, furnishes no ground of demurrer under this or any other of the grounds of demurrer mentioned in the statute, and for that reason is not a ground of demurrer in California,¹ Kentucky,² and perhaps elsewhere. Both at common law³ and under the procedural codes,⁴ where a subsequent pleading,—e. g., a replication, where such pleading is provided for by statute,—departs from the original cause of action as stated in the original complaint, advantage thereof must be taken by demurrer, motion, or otherwise, before going to trial; by voluntarily going to trial with the pleading in such a condition, a defendant is presumed to have waived the objection.⁵

§ 969. ——— ATTACHMENT, ALTERNATIVE FOR BODY OF DEFENDANT—ACTION AGAINST SHERIFF. A writ of entry contained a command to attach the property of the defendant, and for want thereof to take the body; quaere, whether demurrer is a proper mode of taking advantage of the error.¹ Where the defendant, as sheriff, collects money on an attachment more than sufficient to satisfy the attaching creditor, and after the expiration of his term of office another attaching creditor attaches the surplus, and seeks to make the ex-sheriff liable therefor on his official bond, it was held that the demurrer to the complaint was properly sustained, as there is no relation between the defendant and plaintiff to render the defendant officially liable.²

§ 970. ——— BILL OF EXCHANGE—JOINT DEMUR-
RER. It seems that in an action against the drawer and

¹ See, ante, §§ 884, 914.

² *Hord v. Chandler*, 52 Ky. (13 B. Mon.) 403.

³ See 2 Chitty on Pleading (16th Am. ed.), p. 678.

⁴ See Bliss on Code Pleading, § 396.

⁵ *Kannaugh v. Quartette Min.*

¹ Code Pl. and Pr.—84

Co., 16 Colo. 431, 27 Pac. 245. See

New v. Wambach, 42 Ind. 456;

Keay v. Goodwin, 16 Mass. 1;

Andrus v. Warring, 20 Johns. (N. Y.) 153.

¹ *Clement v. Clement*, 18 N. H. 611.

² *Graham v. Endicott*, 7 Cal. 144.

acceptor of a bill, the complaint can not be held bad on a joint demurrer by both defendants,¹ put upon the ground that it does not state facts sufficient to constitute a cause of action, if it states a cause of action against either defendant.² An omission to aver delivery in suit on a bond must be taken advantage of on demurrer,³ because a defect in a complaint which may be demurred to, is cured by verdict.⁴

§ 971. ——— CLAIM AGAINST ESTATE — FAILURE TO ALLEGE PRESENTATION. In an action against an administrator or executor, upon a claim against a decedent, the failure of the complaint to allege presentation and rejection of claim before the commencement of the action, renders it insufficient on objection taken by demurrer on this ground, because without such on a presentation and rejection there is no cause of action under the statute, and a complaint not stating the fact of such presentation and rejection, states no cause of action.¹

After trial, or on an appeal, the objection of nonpresentation of claim can not be raised for the first time, it has been held,² such nonpresentation being merely a matter in abatement of the action,³ and if objection is not

¹ As to joint demurrer generally, see, ante, § 957.

² Woodbury v. Sackrider, 2 Abb. Pr. (N. Y.) 402.

Compare: Peabody v. Washington County Mut. Ins. Co., 20 Barb. (N. Y.) 339.

See, ante, § 962, footnote 3.

³ Garcia v. De Satrustegui, 4 Cal. 244.

⁴ Id.; Wilkinson v. Stidger, 22 Cal. 235, 83 Am. Dec. 65; Parrott v. Scott, 6 Mont. 340, 345, 12 Pac. 763.

¹ See Ellissen v. Halleck, 6 Cal. 386, 393; Hentsch v. Porter, 10 Cal. 555, 558.

See, also, post, § 984.

In Idaho, presentation need not be alleged.—Toulouse v. Burkett, 2 Idaho (West Pub. Co. ed.) 170, 173, 10 Pac. 26.

² Hentsch v. Porter, 10 Cal. 555, 557; Bank of Stockton v. Howland, 42 Cal. 129, 134.

On motion for new trial the objection can not be first taken.—Bank of Stockton v. Howland, 42 Cal. 129, 134.

³ Bemmerly v. Woodward, 124 Cal. 568, 574, 575, 57 Pac. 561; Dowell v. Cardwell, 4 Sawy. 217, 231, Fed. Cas. No. 4039.

taken by special demurrer,⁴ the nonpresentation is deemed waived.⁵

§ 972. ——— CLOUD ON TITLE—FAILURE TO PRESENT CAUSE. The objection that the complaint does not present a case for the exercise of the power of the court to remove a cloud on title may be demurred to, under this cause of demurrer.¹ But a complaint in an action to quiet title, brought by trustees holding under a will, is not subject to a general demurrer under this subdivision, or either of the other subdivisions, on the ground that the complaint shows on its face that one of the plaintiffs was appointed as trustee by four of the remaining trustees, without an order of the court, after one of six trustees named in the will had died, and another had been removed by the court as incompetent, it appearing that the will expressly provided that when the number of trustees was reduced to four, the remaining four should appoint a fifth.²

§ 973. ——— COMPANY OR CO-PARTNERSHIP — FAILURE TO ALLEGE MEMBERSHIP IN. Where a defendant is sued as a member of an association, company, or co-partnership, a complaint failing to allege in the body thereof that the defendant is a member of such association, company, or co-partnership, is vulnerable on demurrer under this subdivision of the statute.¹

§ 974. ——— DATE OF CREATION OF OBLIGATION—ILLEGAL DATE ASSIGNED. In those cases in which the date upon which the contract or obligation sued on is material, it must be accurately pleaded and proved as laid; but in those cases in which the date of making the contract or creating the obligation sued on is immaterial, and the

⁴ *Wise v. Hogan*, 77 Cal. 184, 188, 19 Pac. 278.

² *Irvine v. Davy*, 88 Cal. 495, 76 Pac. 506.

⁵ See footnote 3, this section.

¹ *Tolmie v. Dean*, 1 Wash. Ter.

¹ *Hotchkiss v. Elting*, 36 Barb. 61. (N. Y.) 38, 39.

date assigned thereto in the complaint would make the contract or obligation illegal, this fact will not furnish a ground for demurrer under this subdivision.¹

§ 975. ——— DEFECTIVE COMPLAINT — W H E N VULNERABLE TO. In those cases in which the complaint, though defective, states facts sufficient to constitute a cause of action, the objection to it should be taken by special demurrer,¹—e. g., as the want of profert of letters of administration in New York.² So for a duplicity in the allegations of the complaint.³ A demurrer for duplicity must point it out specifically.⁴

In Alabama, a demurrer will not lie for this ground;⁵ nor will it lie for a variance between judgment and execution, in an action for an escape.⁶

In Colorado, under the code,⁷ the objection that a complaint does not state facts sufficient to constitute a cause of action may be raised by demurrer or motion at any stage of the proceedings.⁸

In New York, a demurrer on the ground of want of facts can only be sustained where the complaint presents defects so substantial in their nature, and so fatal in their character, as to authorize the court to say that, taking all the facts to be admitted, they furnish no cause of action whatever.⁹

¹ *Amory v. McGregor*, 12 Johns. (N. Y.) 287.

¹ *Greenfield v. Gunnell, The Steamer*, 6 Cal. 67; *Lafleur v. Douglass*, 1 Wash. Tr. 215.

² *Allison v. Wilkin*, 1 Wend. (N. Y.) 153.

³ *Brodner v. Demick*, 20 Johns. (N. Y.) 404; *Winterson v. Eighth Ave. R. Co.*, 2 Hilt. (N. Y.) 389; *Wolfe v. Luyster*, 1 N. Y. Super. Ct. Rep. (1 Hall) 146.

⁴ *Currie v. Henry*, 2 Johns. (N. Y.) 433; *Gooding v. McAllister*, 9 How. Pr. (N. Y.) 123.

⁵ *Wynne v. Wisenant*, 37 Ala. 46.

⁶ *Dakin v. Hudson*, 6 Cow. (N. Y.) 221.

⁷ Colo. Civ. Code, § 60.

⁸ *Marriott v. Clise*, 12 Colo. 561, 21 Pac. 909.

⁹ *Richards v. Edick*, 17 Barb. (N. Y.) 260; *Swift v. De Witt*, 1 N. Y. Code Rep. 25, 3 How. Pr. 280, 6 N. Y. Leg. Obs. 314; *Graham v. Camman*, 12 N. Y. Super. Ct. Rep. (5 Duer) 697, 13 How. Pr. 360.

For a substantial and radical defect in the complaint, the proper ground for demurrer is that the complaint does not state facts sufficient to constitute a cause of action.¹⁰

§ 976. ——— DEFECT OF PARTIES — RULING PRO FORMA. A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action does not raise the question of a defect of parties defendant;¹ but the court below having sustained such a demurrer, in the present case, pro forma, with a view to a more speedy decision by this court of the question involved, and the question of a defect of parties having been discussed by counsel on both sides, as though it were raised by the demurrer, the order sustaining the demurrer is reversed, without prejudice to the right of the respondent to object to the want of proper parties.²

Defect of parties apparent it is not a cause for demurrer under this subdivision of the section; but whenever it so appears that the presence of other parties is necessary to a complete determination of the controversy, a demurrer will lie for a defect of parties plaintiff or defendant,³ under subdivision four of the California statute.⁴

§ 977. ——— DIFFERENT FROM STATUTORY TERM USED—SUFFICIENCY. The use in a demurrer of the words, “the complaint does not state a sufficient cause of action,” is equivalent to the statutory language, “the complaint does not state facts sufficient to constitute a cause of action;”¹ but when certain deficiencies are speci-

¹⁰ Haire v. Baker, 5 N. Y. 357, 359; Spear v. Downing, 34 Barb. (N. Y.) 523, 12 Abb. Pr. 437; White v. Brown, 14 How. Pr. (N. Y.) 282.

¹ Tennant v. Pfister, 51 Cal. 511.

² Burhop v. Milwaukee, 18 Wis. 431.

³ Cohen v. Ottenheimer, 13 Ore. 220, 10 Pac. 20.

⁴ See, ante, §§ 935-943.

¹ Swift v. De Witt, 1 N. Y. Code Rep. 25, 3 How. Pr. 280, 6 N. Y. Leg. Obs. 314.

fied, all other grounds for objection are excluded.² It has been said that a complaint for money had and received, which fails to allege a demand, is bad on demurrer,³ on the ground that "a person receiving money to the use of another, is rightfully in possession until the same is demanded;"⁴ but the later cases are to the effect that, although a demand is usual in such cases, the allegation of a demand is not necessary to the sufficiency of the complaint.⁵

§ 978. ——— ENFORCEMENT OF JUDGMENT — LACHES. In the case of an action to enforce a judgment, when it appears from the complaint that the plaintiff, who seeks to enforce the judgment, is chargeable with laches, the defendant may take advantage of this by demurrer under this subdivision of the section,¹ but must frame his demurrer in such a manner as to show the particular section, or subdivision of a section, of the code he relies upon.²

§ 979. ——— EXHIBITS OF MATTERS OF SUBSTANCE — DEMURRER LIES WHEN. Matters of substance, which are necessary to be alleged in a complaint, can not be left out, and the defect supplied by reference to an exhibit attached to and made part of the complaint, and a complaint so drawn is vulnerable to demurrer under this subdivision;¹ but an objection to a complaint that a specific allegation contained therein is contradicted by an exhibit

² *Nellis v. DeForest*, 16 Barb. (N. Y.) 61.

³ *Reina v. Cross*, 6 Cal. 29, 31; *Anderson v. Hulme*, 5 Mont. 295, 299, 5 Pac. 865.

⁴ Criticism of language quoted as not necessary to the decision, and for that reason merely obiter, in *Quimby v. Lyon*, 63 Cal. 394, 395.

⁵ *Quimby v. Lyon*, 63 Cal. 394; *Smith v. Farmers' & Merchants' Bank*, 2 Cal. App. 381, 84 Pac. 349;

Young v. Kimber, 44 Colo. 452, 98 Pac. 1133.

¹ *Maxwell v. Kennedy*, 49 U. S. (8 How.) 210, 12 L. Ed. 1051.

² See, ante, § 726, post, § 993.

¹ ARIZ.—*Barton v. Territory*, 10 Ariz. 109, 85 Pac. 730. CAL.—*Los Angeles, City of, v. Signoret*, 50 Cal. 298; *Burkett v. Griffith*, 90 Cal. 532, 542, 25 Am. St. Rep. 151, 13 L. R. A. 707, 27 Pac. 527; *McCaughy v. Schutte*, 117 Cal. 223,

to which reference is made, can not be taken advantage of by general demurrer.²

§ 980. ———— FORECLOSURE OF MECHANICS' LIEN—CONCLUSION OF LAW. An objection to the complaint in an action to foreclose a lien for materials furnished a contractor, on the ground that it states merely a conclusion of law as to the amount due and owing from the owner to the contractors, and that it contains no specific averment as to what was the contract price between them, or that there was any express agreement to pay anything, or what was the reasonable value of the work to be done, can only be raised by demurrer, and can not be urged for the first time on appeal.¹

§ 981. ———— GUARANTY BASIS OF ACTION—FAILURE TO ALLEGE BREACH. A complaint alleging that the defendants sold to plaintiffs a certain share of fruit growing in an orchard, and after the sale executed a warranty that the share of plaintiffs should be at their disposal, and further alleging a demand for the same, and the refusal of the defendant to deliver, is demurrable,

225, 59 Am. St. Rep. 176, 46 Pac. 666, 48 Pac. 1088; Cook, Estate of, 137 Cal. 184, 191, 69 Pac. 968; San Francisco Sulphur Co. v. Aetna Indemnity Co., 11 Cal. App. 698, 106 Pac. 111. S. D.—Aultman v. Siglinger, 2 S. D. 442, 446, 50 N. W. 911. WYO.—Johnson v. Home Ins. Co., 3 Wyo. 140, 143, 6 Pac. 729.

Compare: Santa Rosa Bank v. Paxton, 149 Cal. 199, 86 Pac. 193.

Essential elements in a cause of action must be presented in the complaint by distinct averments; they can not be left to inference, or be supplied by the construction of a document attached as an exhibit.—Burkett v. Griffith, 90 Cal. 532, 542, 25 Am. St. Rep. 151, 13 L. R. A. 707, 27 Pac. 527; Aultman

v. Siglinger, 2 S. D. 442, 446, 50 N. W. 911.

Explained as merely establishing the doctrine that matters of substance which are preliminary or collateral to the instrument pleaded, can not be supplied by the recitals of such instrument, and as not being in conflict with the rule that it is good pleading to set out in *hæc verba* the instrument upon which the action is founded.—Lambert v. Haskell, 80 Cal. 611, 612, 613, 22 Pac. 327.

² Blassingame v. Home Ins. Co., 75 Cal. 633, 637, 17 Pac. 925, citing Mendocino County v. Morris, 32 Cal. 145.

¹ Russ Lumber & Mill Co. v. Garretson, 87 Cal. 589, 25 Pac. 747.

as it should have contained an assignment of the breach of the contract of guaranty.¹

§ 982. ——— INFERENTIAL STATEMENT—SUFFICIENT AFTER JUDGMENT. In the case of action based upon a cause of action in which an offer to account is a condition precedent to maintaining the action, where timely and proper objection is made on this ground, if this material fact is only inferentially alleged¹ in the complaint, it is the ground for a special demurrer under this subdivision, the special grounds of the demurrer being set out; but if the complaint is not thus objected to by demurrer it will be sufficient after judgment.²

§ 983. ——— LIEN FORECLOSURE — WANT OF DATES. In an action to foreclose a lien, where the complaint fails to set out dates in the lien, objection thereto may be taken by demurrer, or by motion to strike out, but after pleading to the merits, the objection will be deemed waived.¹

§ 984. ——— MORTGAGE FORECLOSURE AGAINST DECEDENT'S ESTATE—PRESENTATION OF CLAIM. In the absence of a statutory regulation to the contrary, a claim against the estate of a decedent, which claim is secured by a mortgage on real estate, is not required to be presented to the administrator or executor for acceptance or rejection before commencing an action in foreclosure;¹ but in California and elsewhere, by statute, all claims are required to be properly presented to the administrator or executor, within the time allowed by law, before a suit thereon can be maintained,² and the word "claims" in

¹ Dabovich v. Emeric, 7 Cal. 209.

¹ As to sufficiency of allegation, see, ante, § 712.

² Hill v. Haskin, 51 Cal. 175; Wells, Fargo & Co. v. McCarthy, 5 Cal. App. 311, 90 Pac. 207; Dillon v. Cross, 5 Cal. App. 768, 91 Pac.

440; Nevin v. Gary, 12 Cal. App. 5, 106 Pac. 423.

¹ Howell v. Philadelphia, City of, 38 Pa. St. 471.

See, post, § 1018.

¹ See Reid v. Sullivan, 20 Colo. 498, 501, 39 Pac. 338.

² See, ante, § 971.

the statute has been held to embrace every species of claim against an estate, whether recorded or not.³ Hence, where the complaint in an action to foreclose a mortgage against the estate of a decedent fails to allege the presentation and rejection of the claim, as required by the statute, the complaint will be vulnerable to a demurrer under this subdivision,⁴ where the mortgaged property is part of the assets of the estate.⁵

§ 985. ——— PERFORMANCE OF CONDITION PRECEDENT—FAILURE TO ALLEGE. Where complaint states a condition precedent, but fails to aver performance, defendant may demur under this subdivision;¹ because a complaint which does not allege performance of one of the essential conditions imposed upon the plaintiffs by the terms of the contract, fails to state a cause of action;² if the complaint is not attacked by demurrer the objection is deemed to have been waived,³ and the defect is cured by verdict.⁴ This rule applies also in the case of a promissory note.⁵ But it has been said that a demurrer for the cause that complaint does not state facts sufficient to constitute a cause of action may be disregarded, if defendant choose to answer instead of standing on the demurrer.⁶

³ *Ellissen v. Halleck*, 6 Cal. 386, 392, 393; *Falkner v. Folsom's Exectrs.*, 6 Cal. 412; *Willis v. Farley*, 24 Cal. 498; *Dodson v. Crocker*, 16 S. D. 488, 94 N. W. 393.

Contra: *Fallon v. Butler*, 21 Cal. 29, 30, 81 Am. Dec. 141, 142, the correctness of which decision is doubted if the case not in fact overruled, in *Ellis v. Polhemus*, 27 Cal. 353.

⁴ *Fretwell v. McLemore*, 52 Ala. 141; *Ellis v. Polhemus*, 27 Cal. 353; *Morse v. Steele*, 149 Cal. 305, 86 Pac. 693; *Burke v. Maguire*, 154

Cal. 462, 98 Pac. 23; *Bush v. Adams' Admr.*, 22 Fla. 190; *Corbett v. Rice*, 2 Nev. 337, 338.

⁵ *Ellissen v. Halleck*, 6 Cal. 386, 392, 393.

¹ *Happe v. Stout*, 2 Cal. 460.

² *Jones v. Perot*, 19 Colo. 141, 34 Pac. 728.

³ See, ante, §§ 877, 878.

⁴ *Happe v. Stout*, 2 Cal. 460, 462.

⁵ *Rogers v. Cody*, 8 Cal. 324; *Sayre v. Mohney*, 35 Ore. 141, 146, 56 Pac. 526.

⁶ *Levey v. Fargo*, 1 Nev. 415.

*Under the California procedural code the rule is otherwise, it being especially provided that an objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by failure to demur.*⁷

§ 986. ——— QUO WARRANTO—RELATOR'S RIGHT TO OFFICE. A complaint in quo warranto proceedings for an alleged usurpation of the office of pilot for the port of San Francisco, which alleges that defendants hold, use, exercise, usurp, and enjoy the office without a license, and also contains certain allegations as to the right of relator to the office, is sufficient; it was held that these allegations as to the relator's right can not be reached by general demurrer, the complaint being good as against the defendants.¹ They are not interested in the question as to the right of relator, but only in the determination of their own right to the office.²

§ 987. ——— RES ADJUDICATA—NOT AVAILABLE. A demurrer will not lie to a complaint on the ground of res adjudicata, unless it avers that everything in controversy, as the foundation of the suit, was in controversy in the former suit.¹ The judgment of a court of competent jurisdiction upon a material matter put directly in issue by the pleading is res adjudicata as to that issue, and the parties are estopped by the judgment from litigating it again.² A general demurrer does not raise the question whether a judgment pleaded as an estoppel does estop the defendants.³

⁷ Kerr's Cyc. Cal. Code Civ. Proc., § 434.

¹ People ex rel. Flynn v. Abbott, 16 Cal. 358; People ex rel. Hardacre v. Rea, 2 Cal. App. 109, 111, 83 Pac. 165.

² People ex rel. Flynn v. Abbott, 16 Cal. 358; People ex rel. Fleming v. Shorb, 100 Cal. 537, 541, 38 Am. St. Rep. 310, 50 Pac. 163; People ex rel. Gesford v. Superior Court (dis. op.), 114 Cal. 466, 478, 46 Pac.

383; People ex rel. Bledsoe v. Campbell, 138 Cal. 11, 17, 70 Pac. 918.

¹ Moss v. Anglo-Egyptian Nav. Co., L. R. 1 Ch. 108; Smith v. Halifax Banking Co., 1 N. B. Eq. 17.

² Jackson v. Lodge, 36 Cal. 28. See McLenna v. McDonnell, 78 Cal. 273, 277, 20 Pac. 566; Hall v. Susskind, 109 Cal. 203, 206, 41 Pac. 1012.

³ Spanagel v. Reay, 47 Cal. 608.

§ 988. ——— SECURITIES NOT PROMISSORY NOTES —WAIVER. In an action to foreclose a mortgage given to secure eight promissory notes “payable in gold dust, at sixteen dollars per ounce, Troy,” an objection that the securities sued on are not promissory notes, and therefore do not import consideration, if of any force, should be taken by demurrer for a failure to allege a consideration; and a demurrer filed wherein this objection is not specifically pointed out, constitutes a waiver of the objection.¹

§ 989. ——— SERVICES AS PHYSICIAN—LACK OF DIPLOMA. In a suit by a physician against a county on a contract for his services for one year as examining physician of the hospital, the objection that he is not a graduate of a legally constituted medical institute, if good at all, can not be taken by demurrer, unless the demurrer distinctly presents the objection.¹

§ 990. ——— SPECIFIC EQUITABLE RELIEF—REMEDY AT LAW. To entitle the plaintiff to subject the assets of an absent debtor to the payment of his claim, he must show that he is without a remedy at law, and if the complaint discloses such remedy at law it will be dismissed upon demurrer;¹ but a court of equity will entertain a suit by a purchaser at judicial sale to set aside a fraudulent deed made by the execution debtor.²

§ 991. ——— STAMP ON NOTE—FAILURE TO ALLEGE. In an action on a promissory note which, by the revenue law, is required to bear a revenue stamp in order to be valid, the complaint need not allege that the note was duly stamped, and the copy of the note set out or attached as an exhibit need not contain a copy of the

¹ Powell v. Ross, 4 Cal. 197.

¹ McDaniel v. Yuba County, 14 Cal. 444. See Sailor v. Coldwell, 65 Kan. 89, 68 Pac. 1085.

¹ Lupton v. Lupton, 3 Cal. 120.

² Hager v. Shindler, 29 Cal. 55.

revenue stamp, because such revenue stamp is no part of the note; hence a demurrer to the complaint on the ground that it does not set out facts sufficient to constitute a cause of action, because it fails to show that the note was stamped, will be overruled.¹ To defeat a recovery upon an unstamped note, where it is required to be stamped, it must be made to appear not only that it was not stamped as required by law, but that the stamp was fraudulently omitted, which can not be done on demurrer to the complaint, but must be by answer and proof.²

§ 992. ——— STATUTE OF FRAUDS—PRESUMPTION IN WRITING. In those cases in which the instrument declared on is shown from the face of the complaint to be within the statute of frauds, a failure to allege that it was in writing, may be taken advantage of by demurrer under this subdivision.¹ But where the contract declared upon is void if not in writing, the court will assume, for the purposes of the demurrer, that it is in writing, though not so alleged.²

§ 993. ——— STATUTE OF LIMITATIONS—EXCUSING DELAY. In those cases in which it appears on the face of the complaint that the demand is barred by the statute of limitations, a demurrer, either general or special,¹ will be sustained; but the bar of the statute must

¹ Hallock v. Jaudin, 34 Cal. 167, 175; Trull v. Moulton, 94 Mass. (12 Allen) 396; Hitchcock v. Sawyer, 39 Vt. 412.

² Hallock v. Jaudin, 34 Cal. 167, 175; Desmon v. Norris, 92 Mass. (10 Allen) 250; Beebe v. Hutton, 37 Barb. (N. Y.) 187; Lane v. Mullins, 1 Gale & D. 172; Bradley v. Bradley, 14 Mees. & W. 878; Hudleston v. Briscoe, 11 Ves. 596.

¹ Manning v. Pippen, 86 Ala. 357, 11 Am. St. Rep. 46, 5 So. 572; Dicken v. McKinley, 163 Ill. 318, 54 Am. St. Rep. 741, 45 N. E. 134;

Randall v. Howard, 67 U. S. (2 Black.) 585, 17 L. Ed. 269.

² Miles v. Thorne, 38 Cal. 335, 337, 99 Am. Dec. 384. See Brennan v. Ford, 46 Cal. 8, 13; Reagan v. Justices' Court, 75 Cal. 253, 255, 17 Pac. 195; Broder v. Conklin, 77 Cal. 330, 336, 19 Pac. 513.

¹ Defense of laches appearing upon the face of the complaint, which fails to set forth facts excusing delay, may be set up by demurrer, either general or special.—Kerfoot v. Billings, 160 Ill. 563, 43 N. E. 804; Sands v. St. Johns, 36

clearly appear on the face of the complaint,² and the complaint must not contain any allegations of facts excusing the delay. Where the complaint fails to show whether the contract was verbal or in writing, it will be presumed to be in writing, for the purposes of the demurrer.³ It should be distinctly stated in the demurrer, it can not be raised on a general demurrer;⁴ and is a personal privilege which must be set up or be deemed waived.⁵ Under the California system the rule is the same in law and equity; and if it appear upon the face of the complaint that the action is barred, and no facts are alleged taking the demand from the operation of the statute, the complaint is defective, and demurrer lies.⁶ If the demand be in truth barred, but the fact does not appear upon the face of the complaint, the defense must be made by answer. Where a bill in equity states a case to which the act of limitations applies, without bringing it within some of the saving clause, the defendant may take advantage of the bar by demurrer;⁷ although it has

Barb. (N. Y.) 628, 23 How. Pr. 140; affirmed, 4 Abb. Ct. App. Dec. 153.

² Ord v. De la Guerra, 18 Cal. 67; Smith v. Hall, 19 Cal. 85; Smith v. Richmond, 19 Cal. 476; Kraner v. Halsey, 82 Cal. 209; 22 Pac. 1137; Castro v. Geil, 110 Cal. 292, 52 Am. St. Rep. 84, 42 Pac. 804; Fulton v. Northern Illinois College, 158 Ill. 333, 42 N. E. 138; Meyer v. Saul, 82 Md. 459, 33 Atl. 539.

³ Miller v. Thorne, 38 Cal. 335, 99 Am. Dec. 384.

⁴ Brown v. Martin, 25 Cal. 82, 89; Farwell v. Jackson, 28 Cal. 106; Bliss v. Sneath, 119 Cal. 526, 528, 51 Pac. 848; California Safe Deposit & T. Co. v. Sierra Valleys R. Co., 158 Cal. 690, 698, Ann. Cas. 1912A, 729, 112 Pac. 274; Hexter v. Clifford, 5 Colo. 168, 173; Ful-

lerton v. Bailey, 17 Utah 85, 93, 53 Pac. 1020.

⁵ Grattan v. Wiggins, 23 Cal. 16; People ex rel. Board of Harbor Commrs. v. Broadway Wharf Co., 31 Cal. 33, 46; Buckingham v. Orr, 6 Colo. 587; Hunt v. Hoyt, 10 Colo. 278, 15 Pac. 410; Jennings v. Rickard, 10 Colo. 395; 15 Morr. Min. Rep. 624, 15 Pac. 677; Connell v. Clifford, 39 Colo. 121, 88 Pac. 850; Brown v. Bell, 46 Colo. 163, 133 Am. St. Rep. 54, 33 L. R. A. (N. S.) 1096, 103 Pac. 380; Kraft v. Great-house, 1 Idaho 256, 258; Barnes v. Union Pac. R. Co., 4 C. C. A. 199, 12 U. S. App. 1, 54 Fed. 87.

⁶ Smith v. Richmond, 19 Cal. 476; Maxwell v. Kennedy, 43 U. S. (8 How.) 210, 12 L. Ed. 1051.

⁷ Wisner v. Ogden, 4 Wash. C. C. 631, Fed. Cas. No. 17914.

been held that where there is an objection to the complaint on the ground of laches, and the complaint shows upon its face that the action was not brought within the time limited, the question of the bar of the statute can not be raised by demurrer unless the complaint also shows on its face that the particular action is not within any of the exceptions to the statute.⁸ Where the statute creates an absolute bar by mere lapse of time, without exception, the defense may be made by demurrer, if the necessary facts appear in the complaint.⁹ But the demurrer should be resorted to only where it clearly appears that the plaintiff's case has been fully stated, and that being so stated no recovery can be had.¹⁰ By the practice in New York, it appears that the defense of the statute of limitations can only be taken by answer.¹¹ An allegation in a demurrer "that it appears by the complaint that the cause of action is barred by the statute of limitations," is sufficient in form to raise the question of law as to whether the alleged cause of action is barred by the statute.¹²

§ 994. ——— STATUTORY PENALTY—RIVAL FERRY. In an action to recover damages by the owner of a licensed ferry against a party alleged to have run a ferry within the limits prohibited by law, it was held that the complaint should have alleged that defendant ran his ferry for a fee or reward, or the promise or expectation of it, or that he ran for other than his own personal use, or that of his family; and the omission of those allegations was fatal.¹

⁸ Dorsey Machine Co. v. McCaffrey, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208.

⁹ State v. Bird, 22 Mo. 470.

¹⁰ McNair v. Lott, 25 Mo. 182.

¹¹ Sands v. St. John, 36 Barb.

(N. Y.) 628, 23 How. Pr. 140; affirmed, 4 Abb. Ct. App. Dec. 153.

¹² Brennan v. Ford, 46 Cal. 8.

¹ Hanson v. Webb, 3 Cal. 236, 237.

Injunction for interfering with franchise. See, ante, § 906.

§ 995. ——— TRESPASS, ACTION FOR — PLAINTIFF'S FAILURE TO COMPLY WITH STATUTE. In an action for trespass, the failure on the part of the owner of land upon which alleged trespass was committed, to comply with certain statutory requirements in connection with his land, conceding it to be a defense to an action for the trespass, can not be taken advantage of by demurrer to a complaint in which no such fact is alleged.¹

§ 996. ——— UNDERTAKING—ON ATTACHMENT. In an action on an undertaking, executed to release property from attachment, the complaint should allege that the property attached was released upon the delivery of the undertaking;¹ a failure to so allege is fatal, and the defect may be taken advantage of by demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action.²

§ 997. ——— PENAL BONDS. In an action by the postmaster general against a deputy postmaster and his sureties, on the bond executed by them, the sureties pleaded that plaintiff did not, as he was bound by law to do, call upon his deputies to settle his accounts, or cause suits to be brought against him for not so doing; nor did he give notice to the sureties of the defaults; but fraudulently and in violation of his duty to the United States and to the sureties, neglected to bring such actions, and to give notice; it was held that the demurrer having admitted the fraud stated in the plea, the plaintiff could not recover.¹

¹ *Triscony v. Brandenstein*, 66 Cal. 514, 6 Pac. 384.

¹ *Williamson v. Blattan*, 9 Cal. 500; *Burke v. Maguire*, 154 Cal. 462 98 Pac. 24.

² *Id.*; *Coburn v. Pearson*, 57 Cal. 208; *Burke v. Maguire*, 154 Cal. 462, 98 Pac. 24; *Selz, Schwab & Co. v. Tucker*, 10 Utah 132, 37 Pac. 249.

¹ *McCue v. Washington, City of*, 3 Cr. C. C. 639, Fed. Cas. No. 8735; *United States v. Sawyer*, 1 Gall. 86, Fed. Cas. No. 16227; *Greathouse v. Dunlap*, 3 McL. 303, Fed. Cas. No. 5742; *Postmaster General v. Ustick*, 4 Wash. C. C. 347, Fed. Cas. No. 11315.

§ 998. ——— OBJECTIONS WHEN AND HOW TAKEN.—
IN GENERAL. A demurrer, under the sixth subdivision, will be sustained to a complaint in those cases only when the defect is such as would render the count bad on general demurrer at law, or bad for want of equity in chancery. The complaint, therefore, to be overthrown by such a demurrer, must present defects so substantial in their nature, and so fatal in their character, as to authorize the court to say, taking all the facts to be admitted, that they furnish no cause of action whatever. Where the demurrer admits facts enough to constitute a cause of action, the complaint will be sustained; and if the defendant required a greater degree of certainty than is found in the complaint, he must seek his relief by a motion that the pleading be made more certain and definite.¹ Where a complaint fails to state a cause of action, and the defendant at the trial objects, on that ground, to the introduction of any evidence, such objection is equivalent to a general demurrer and a judgment for the plaintiff must be reversed.² Demurrer under this subdivision may be taken at any stage of the case.³ Nor is the failure to demur upon this ground a waiver of the objec-

¹ *Summers v. Farish*, 10 Cal. 347; *Thomson v. O'Sullivan*, 88 Mass. (6 Allen) 303; *Allen v. Patterson*, 7 N. Y. 476, 1 Seld. Notes 32, 57 Am. Dec. 542; *Sinclair v. Fitch*, 3 E. D. Smith (N. Y.) 577; *People v. New York, City of*, 28 Barb. (N. Y.) 240, 8 Abb. Pr. 7, 17 How. Pr. 56; reversed on another point, 10 Abb. Pr. 111; *Richards v. Beavis*, 28 Eng. L. & Eq. 157.

In absence of motion to make more definite and certain, all allegations in the complaint should be taken as true, whether well pleaded or not.—*Stewart v. Balderstone*, 10 Kan. 149.

² *Hays v. Lewis*, 17 Wis. 210.

³ **COLO.**—*Stevenson v. Lord*, 15 Colo. 131, 25 Pac. 313. **N. Y.**—*Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459, 464, 1 Seld. Notes 12, modifying 9 Barb. 396; *People v. Booth*, 32 N. Y. 397; *Gould v. Glass*, 19 Barb. 179, 186; *Higgins v. Freeman*, 9 N. Y. Super. Ct. Rep. (2 Duer) 650. **OKLA.**—*Farris v. Henderson*, 1 Okla. 384, 33 Pac. 380. **S. D.**—*Johnson v. Burnside*, 3 S. D. 230, 52 N. W. 1057. **WASH.**—*Lyon v. Bond*, 3 Wash. Tr. 407, 19 Pac. 35. **WIS.**—*Hays v. Lewis*, 17 Wis. 210.

tion.⁴ But under this subdivision defendant can not bring objections to the form of the action;⁵ nor that the court has no jurisdiction;⁶ nor that there is an improper joinder of parties;⁷ nor that the plaintiff has no legal capacity to sue;⁸ nor that the right to sue is in a third person not a party to the action;⁹ nor that complaint does not show authority to sue.¹⁰ The practice of pleading to the merits, and then raising at the trial an objection in the nature of a demurrer to the sufficiency of the pleading, is one which the courts should discourage.¹¹ The objection that money sued for, if due at all, is due to plaintiff and another as partners, is not a demurrer.¹² When the bill alleges a parol trust, a general demurrer will not lie.¹³

§ 999. ——— STATEMENT OF GROUNDS. The demurrer is sufficient without a specification of the reason why the facts stated are not sufficient;¹ it being sufficient, under this subdivision, to state that the complaint does not state facts sufficient to constitute a cause of action.²

⁴ Kerr's Cyc. Cal. Code Civ. Proc., § 434; Andrews v. Lynch, 27 Mo. 167; Ludington v. Taft, 10 Barb. (N. Y.) 447.

⁵ Loomis v. Tiff, 16 Barb. (N. Y.) 541; Richards v. Edick, 17 Barb. (N. Y.) 260; Graham v. Camman, 12 N. Y. Super. Ct. Rep. (5 Duer) 697.

⁶ Wilson v. New York, City of, 6 Abb. Pr. (N. Y.) 6, 16 How. Pr. 500, 4 E. D. Smith 706, note.

⁷ Eldridge v. Bell, 12 How. Pr. (N. Y.) 547.

⁸ Viburt v. Frost, 3 Abb. Pr. (N. Y.) 119, 120; Hobart v. Frost, 12 N. Y. Super. Ct. Rep. (5 Duer) 671.

⁹ Myers v. Machado, 13 N. Y. Super. Ct. Rep. (6 Duer) 678, 6 Abb. Pr. 198, 14 How. Pr. 149.

But see: Palmer v. Smedley, 28 Barb. (N. Y.) 468, 6 Abb. Pr. 205;

1 Code Pl. and Pr.—85

De Witt v. Chandler, 11 Abb. Pr. (N. Y.) 459; Bank of Lowville v. Edwards, 11 How. Pr. (N. Y.) 216.

¹⁰ Bank of Havana v. Wickman, 7 Abb. Pr. (N. Y.) 134, 16 How. Pr. 97; affirmed, 20 N. Y. 355.

¹¹ Barton v. Gray, 48 Mich. 166, 12 N. W. 30; Bauman v. Bean, 57 Mich. 1, 23 N. W. 451; Jenkinson v. Vermillion, City of, 3 S. D. 238, 52 N. W. 1066.

¹² Andrews v. Mokelumne Hill Co., 7 Cal. 330, 334; Williams v. Southern Pac. R. Co., 110 Cal. 457, 461, 42 Pac. 974.

¹³ Peralta v. Castro, 6 Cal. 354, 358, 359.

¹ Kent v. Snyder, 30 Cal. 666. See Burke v. Maguire, 154 Cal. 463, 98 Pac. 24.

² Haire v. Baker, 5 N. Y. 357; Johnson v. Wetmore, 12 Barb. (N. Y.) 433; Paine v. Smith, 9

But where a special privilege or immunity is claimed by the defendant, it must be specially pleaded by demurrer or answer;³ thus where the protection of the statute of limitations is invoked against a complaint showing on its face that the cause of action is barred, the objection must be taken by special demurrer.⁴

§ 1000. — 7. COMPLAINT AMBIGUOUS—IN GENERAL. In California, prior to the amendment of 1907, the seventh ground upon which a defendant could demur to a complaint was that it was (1) ambiguous, (2) unintelligible, or (3) uncertain. The legislature at the session of 1906-7 amended the section of the procedural code adding two additional grounds of: 8 Unintelligibility, and 9 Uncertainty, leaving the seventh ground ambiguity alone.¹ This amendment was doubtless made to meet the objections to and decisions upon the seventh ground for defendant's demurrer, as it theretofore stood. In 1889 it was decided that the word "uncertainty," as used in the seventh subdivision of the section of the code regulating defendant's demurrers, did not include "ambiguity" as used in that section, but referred to the uncertainty in pleading defined by authors.²

Conjunctive demurrer on the ground that the complaint was (1) ambiguous, (2) unintelligible, and (3) uncertain, it was held, must be overruled if any one of the objections was not well taken; that is, that all the defects pointed out and conjoined in such a demurrer by the copulative particle "and" must exist, or the demurrer would have to be overruled, even though a demurrer pointing out one of

N. Y. Super. Ct. Rep. (2 Duer) 298.

Sierra Valleys R. Co., 158 Cal. 698, 112 Pac. 278.

Compare: Purdy v. Carpenter, 6 How. Pr. (N. Y.) 361; Hinds v. Twedde, 7 How. Pr. (N. Y.) 278.

⁴ Bliss v. Sneath, 119 Cal. 526, 528, 51 Pac. 848.

³ Kent v. Snyder, 30 Cal. 666,

¹ Kerr's Cyc. Cal. Consolidated Supp. 1906-1913, p. 1450.

672; Brennan v. Ford, 46 Cal. 12;

² Kraner v. Halsey, 82 Cal. 209,

California Safe Deposit & T. Co. v.

22 Pac. 1137.

the objections alone,—e. g., uncertainty,—would have been well taken.³ This ruling was approved and followed on this point by subsequent cases in California,⁴ and adopted in Montana,⁵ and possibly elsewhere. But it is held that a conjunctive demurrer on the general grounds of ambiguity, unintelligibility, and uncertainty will be regarded only as a demurrer for uncertainty, where the only specifications made are on the ground of uncertainty.⁶

§ 1001. ——— DEMURRER LIES WHEN—POINTING OUT VICE. Under this subdivision it is necessary for the pleader to point out wherein the complaint is ambiguous, or it will be disregarded.¹ The defendant is entitled to a distinct averment in the complaint of all the facts which the plaintiff claims to exist,² and if the averments are in the alternative, the complaint is ambiguous, and bad on demurrer, even if either averment states a cause of

³ Id.; *Field v. Andrada*, 106 Cal. 107, 39 Pac. 323.

Compare: *Greenebaum v. Taylor*, 102 Cal. 624, 36 Pac. 957; *Ryan v. Jacques*, 103 Cal. 280, 37 Pac. 186.

⁴ *White v. Allatt*, 87 Cal. 245, 248, 25 Pac. 420; *Greenebaum v. Taylor*, 102 Cal. 624, 626, 36 Pac. 957.

⁵ See *Ward v. Gallatin County Commrs.*, 12 Mont. 23, 31, 29 Pac. 658.

⁶ *Spargur v. Heard*, 9 Cal. 221. See: *White v. Allatt*, 87 Cal. 245, 25 Pac. 420; *Wilhoit v. Cunningham*, 87 Cal. 453, 25 Pac. 675.

¹ *Blanc v. Klumpke*, 29 Cal. 156; *Yolo County v. Sacramento, City of*, 36 Cal. 193; *Lorenzana v. Camarillo*, 45 Cal. 125; *Jacobs Sultan Co. v. Union Mercantile Co.*, 17 Mont. 61, 42 Pac. 109.

See, also, authorities in footnote 6, this section.

Under general demurrer objection can not be taken that the complaint is ambiguous.—*Slattery v. Hall*, 43 Cal. 191, 196.

² Averment of delivery of horse to sell, of the value of three hundred dollars, on an agreement by the defendant that he would sell it and account for the proceeds; that the defendant accepted the horse at the price of three hundred dollars, and promised to sell it at that price and account to plaintiff for the proceeds, and then further alleging that the defendant sold the horse and failed to account for the proceeds without stating at what price the horse was sold, is ambiguous and uncertain.—*Tomlinson v. Monroe*, 41 Cal. 94.

action.³ A demurrer on the ground of ambiguity should be overruled if enough appears to render the pleading demurred to easy of comprehension and free from reasonable doubt.⁴ The question of ambiguity is not raised on demurrer for want of facts.⁵ In California, if there are any valid objections to a complaint on the ground of ambiguity, such objections can only be taken by special demurrer.⁶ A demurrer alleging that the complaint is "multifarious and improperly confounds two distinct causes of action not belonging to the same class," and "that the complaint is ambiguous, unintelligible and uncertain," is held not to be sufficiently definite.⁷ The objection that the averments of a complaint are contradictory must be taken by special demurrer.⁸ And a

³ *Jamison v. King*, 50 Cal. 132; *Goodspeed, Estate of*, 2 Cal. Prob. (Cal.) 151; *Ilfeld v. Zeigler*, 40 Colo. 407, 91 Pac. 827; *Palmer v. Utah & N. R. Co.*, 2 Idaho (West Pub. Co. Ed.) 190, 193, 13 Pac. 425; *Anderson v. Minneapolis, St. P. & Ste. M. R. Co.*, 103 Minn. 229, 14 L. R. A. (N. S.) 886, 114 N. W. 1125.

⁴ *Salmon v. Wilson*, 41 Cal. 595, 602; *Applegarth v. Dean*, 63 Cal. 491, 494, 13 Pac. 587; *Kraner v. Halsey*, 82 Cal. 209, 213, 22 Pac. 1137; *Whitehead v. Sweet*, 126 Cal. 67, 73, 58 Pac. 376; *Jones v. Iverson*, 131 Cal. 101, 104, 63 Pac. 135; *Ward v. Gallatin County Commrs.*, 12 Mont. 23, 31, 29 Pac. 658.

"Complaint very loosely drawn and contains much useless verbiage; but, taken all together, the facts stated were sufficient to sustain the action. The demurrer was to the whole complaint, and, not being good as to all, was properly overruled."—*Weaver v. Conger*, 10 Cal. 234.

—General demurrer, in the

above case, for ambiguity, etc., and a special demurrer for misjoinder of causes of action.—See *People ex rel. Pierce v. Morrill*, 26 Cal. 336.

⁵ *Slattery v. Hall*, 43 Cal. 191.

⁶ *Blanc v. Klumpke*, 29 Cal. 156, 157; *Yolo County v. Sacramento City of*, 36 Cal. 193, 196; *Demartin v. Albert*, 68 Cal. 277, 279, 9 Pac. 157; *Colton v. Onderdonk*, 96 Cal. 155, 31 Am. St. Rep. 198, 30 Pac. 1113; *Kirsch v. Derby*, 96 Cal. 602, 605, 31 Pac. 567; *Kerling v. Kerling*, 118 Cal. 413, 420, 50 Pac. 546; *Sharpleigh Hardware Co. v. Kippenberg*, 133 Cal. 308, 311, 65 Pac. 621; *Palmer v. Utah & N. R. Co.*, 2 Idaho (West Pub. Co. Ed.) 290, 293, 13 Pac. 425.

See, also, authorities in footnote 11, this section.

⁷ *Owen v. Oviatt*, 4 Utah 95, 6 Pac. 527.

⁸ *Heeser v. Miller*, 77 Cal. 192, 19 Pac. 375; *Churchill v. Lauer*, 84 Cal. 233, 234, 24 Pac. 107.

complaint is demurrable for ambiguity if its allegations are inconsistent with an exhibit thereto attached.⁹ The rule that error which does not affect substantial rights is to be disregarded is applied to a demurrer for ambiguity,¹⁰ and especially is this true where the defendant was not misled by the apparent ambiguity complained of, which consisted largely in a statement of useless and surplus matter, and the cause of action was fairly apparent upon the face of the complaint.¹¹

§ 1002. ——— ACTION IN EJECTMENT. In an action in ejectment, where the complaint avers that “the plaintiff on a day named was, and ever since has been, and still is, the owner in fee simple, seised and possessed,” etc.; “that, on a day thereafter named, and while the plaintiff was so the owner in fee simple, seised and possessed, defendants entered and ousted him, and from thence hitherto have and still do withhold the same,” etc., the complaint may be demurred to for ambiguity;¹ but such ambiguity will not vitiate the complaint unless specially demurred to for that reason,² an objection on this ground is too late where it is raised for the first time on the trial.³

§ 1003. ——— CLERICAL ERRORS. Where a complaint in ejectment against several defendants, alleges that the “defendant,” the ouster, instead of the “defendants,” a special demurrer on the ground that the com-

⁹ Mendocino County v. Morris, 32 Cal. 145; Frazer v. Barlow, 63 Cal. 71; Blasingame v. Home Ins. Co., 75 Cal. 633, 637, 17 Pac. 925; Malone v. Big Flat Gravel Min. Co., 76 Cal. 578, 18 Pac. 772; Aliso Water Co. v. Baker, 95 Cal. 268, 30 Pac. 537; Palmer v. Laving, 104 Cal. 30, 33, 37 Pac. 775; Penrose v. Pacific Mut. Life Ins. Co., 66 Fed. 254.

¹⁰ Gassen v. Bower, 72 Cal. 555.

14 Pac. 206. See Reynolds v. Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449.

¹¹ Alexander v. Central Lumber & Mill Co., 104 Cal. 532, 537, 38 Pac. 410.

¹ Brown v. Martin, 25 Cal. 82.

² Id.; McClelland v. Dickenson,

² Utah 100, 103.

³ Burke v. McDonald, 2 Idaho (West Pub. Co. Ed.) 310, 312, 13 Pac. 351.

plaint is ambiguous will be overruled, because the mere clerical error could not have misled the defendants to their prejudice.¹

§ 1004. ——— ACTION ON OFFICIAL BOND. Where an action is brought on an official bond, if the complaint alleges the execution of the bond, and a copy of the bond annexed should not contain the signature of the principal, defendant may demur for ambiguity,¹ but is good unless specially demurred to for that reason.² A complaint in an action on the bond given by a tax-collector is not ambiguous and uncertain because it does not aver that any of the money sued for was collected on account of foreign miners' licenses.³

§ 1005. ——— CONTRADICTORY ALLEGATIONS. A complaint alleging that the defendants "covenanted and agreed with the said plaintiffs to lease to them" certain described premises, for the term of one year then next ensuing, and that, in consideration thereof, the plaintiffs promised to pay the defendants certain specified sums of money at designated times,—thus stating an agreement to lease; and then further alleging that the contract was "in substance and to the effect that they, the plaintiffs, could make the necessary preparations and arrangements, to enter into and take possession of the said premises, and have the use and occupation thereof,"—thus stating a present lease. The allegation as to the breach being simply that the defendants "have wholly neglected, failed, and refused to comply with the terms of their said agreement, or to keep and perform their covenants,

¹ *Fay v. McKeever*, 59 Cal. 307, 309. See: *Salmon v. Wilson*, 41 Cal. 595; *Gassen v. Bower*, 72 Cal. 555, 14 Pac. 206; *Alexander v. Central Lumber & Mill Co.*, 104 Cal. 532, 38 Pac. 410.

Compare: Post, § 1007.

¹ *Mendocino County v. Morris*, 32 Cal. 145.

² *Id.*; *San Francisco Sulphur Co. v. Ætna Indemnity Co.*, 11 Cal. App. 698, 106 Pac. 112.

See, also, ante, § 1001, footnote 9, and § 1002, footnote 2.

³ *People v. Love*, 25 Cal. 520.

though requested so to do," not throwing any light upon or assisting to solve the doubt raised by the conflicting allegations, the complaint was held bad upon demurrer for ambiguity.¹

§ 1006. ——— ITEMS OF ACCOUNT NOT SET FORTH. In an action on an account, a failure of the complaint to set out the items of the account sued on, does not render the complaint bad for ambiguity.¹

§ 1007. ——— NOTES OF PARTNERSHIP — CLERICAL ERROR. In the case of an action founded upon the promissory notes of a co-partnership or firm, executed in the firm name, where the members of the co-partnership or firm are described in the caption of the complaint, but the body of the complaint throughout uses the term "defendant," in stead of the term defendants, and alleges that the defendant has not paid the notes, the complaint is vulnerable to a special demurrer on the ground of ambiguity, and is so radically defective that, were the demurrer overruled, and the plaintiff declined to amend when the defect was pointed out, any judgment in favor of the plaintiff thereon would be reversed.¹

§ 1008. ——— TIME WHEN SERVICES RENDERED. In an action for services rendered, or for work and labor performed, a complaint which fails to state the times at which the services were performed, or the work and labor done, or when the claim for items thereof accrued, is not vulnerable to a demurrer for ambiguity.¹

¹ Crow v. Hildreth, 39 Cal. 618; Reed v. Poindexter, 16 Mont. 294, 40 Pac. 596.

¹ Burns v. Cushing, 96 Cal. 669, 31 Pac. 1124; Rogers v. Duff, 97 Cal. 66, 31 Pac. 836; Farwell v. Murray, 104 Cal. 464, 38 Pac. 199; Pleasant v. Samuels, 114 Cal. 34, 38, 42 Pac. 990; Long Beach

School Dist. v. Dodge, 135 Cal. 401, 407, 67 Cal. 499.

See, also, post, § 1008.

¹ Hawley Brothers Hardware Co. v. Brownstone, 123 Cal. 643, 646, 56 Pac. 468.

Compare: Ante, § 1003.

¹ McFarland v. Holcomb, 123 Cal. 84, 87, 55 Pac. 761.

See, also, ante, § 1006.

§ 1009. — 8. COMPLAINT UNINTELLIGIBLE. The fact that the complaint in an action is unintelligible, has always been a ground of demurrer on the part of a defendant, in California;¹ but until the amendment of 1907 to the code section prescribing the grounds upon which a defendant can demur to a complaint,² unintelligibility was joined, as a ground of demurrer, with ambiguity and uncertainty.

Matters of inducement to the contract declared upon, being no essential part of the contract which is the foundation of the action, do not render the complaint “unintelligible,” where it is otherwise sufficiently clear and readily comprehensible.³

§ 1010. — 9. COMPLAINT UNCERTAIN—IN GENERAL. We have already seen that the word “uncertain,” as used in the section of the California procedural code designating the grounds upon which a defendant may demur to a complaint, has been construed as not including the word “ambiguous,” as also used in that section of the code;¹ its meaning being restricted to the uncertainty defined by legal authorities in pleading,² and the objection goes merely to a doubt as to what the pleader means by the facts alleged, and not to a failure to allege sufficient facts.³ Where a complaint contains all the essential averments to constitute a good cause of action, but states the facts in a form too general to enable the defendant to meet them by a specific technical defense, the objection should not be taken by demurrer for uncertainty, but by a motion to make the complaint more specific and certain.⁴

¹ Tibbets v. Riverside Land & Irr. Co., 61 Cal. 160.

See Kerr's Cyc. Cal. Code Civ. Proc., 1st ed., § 430.

² See, ante, § 1000.

³ Henke v. Eureka Endowment Assoc., 100 Cal. 429, 433, 34 Pac. 1089.

¹ See, ante, § 1000.

² Kraner v. Halsey, 82 Cal. 209, 213, 22 Pac. 1137.

³ Callahan v. Broderick, 124 Cal. 80, 83, 56 Pac. 732.

⁴ Pfister v. Wade, 69 Cal. 133, 136, 10 Pac. 369.

§ 1011. ——— DEMURRER LIES WHEN — IN GENERAL. Uncertainty of the complaint, as a ground of demurrer on the part of a defendant, in California,¹ was united with ambiguity² and unintelligibility,³ until the amendment, to the section of the procedural code providing the grounds for a defendant's demurrer to a complaint, by the legislature of 1906-7.⁴ In Idaho, defects in pleading which make the pleading uncertain, or if litigants do not understand the meaning of the allegations of a pleading, and feel that they may be deceived or misled by them, their remedy is by special demurrer, under the procedural code,⁵ the remedy by statute being ample to require the pleader to be more specific, definite and certain.⁶ In New York⁷ and Ohio,⁸ on the other hand, mere indefiniteness or uncertainty in a complaint or other pleading is not ground for demurrer. In Oregon⁹ and Washington,¹⁰ if the pleadings are not full and accurate, or clear and readily understandable, the remedy is by motion to cure the defect.

Uncertainty in a complaint can not be said to exist where it pleads specially the simple cause of a joint purchase by a partnership and an individual, even though the individual be one of the co-partners in the firm; nor

¹ *Kraner v. Halsey*, 82 Cal. 209, 212, 22 Pac. 1137.

² See, ante, §§ 1000-1008.

³ See, ante, § 1009.

⁴ See, ante, § 1000. See, also, *Mallory v. Thomas*, 98 Cal. 644, 646, 33 Pac. 757.

⁵ *Palmer v. Utah & N. R. Co.*, 2 Idaho (West Pub. Co. Ed.) 290, 13 Pac. 425.

⁶ *Dittemore v. Cable Milling Co.*, 16 Idaho 298, 133 Am. St. Rep. 98, 101 Pac. 593.

⁷ *People ex rel. Crane v. Ryder*, 12 Cal. 433, affirming 16 Barb. 370; *Roeder v. Ormsby*, 13 Abb. Pr.

(N. Y.) 334, 22 How. Pr. 270; *Chesborough v. New York & E. R. Co.*, 26 Barb. (N. Y.) 9, 13 How. Pr. 557; *Finnerty v. Barker*, 7 N. Y. Leg. Obs. 316. (Omission to state time and place of slander.)

⁸ *Trustees v. Odlin*, 8 Ohio St. 293; *Lewis v. Coulter*, 10 Ohio St. 451; *Union Bank v. Bell*, 14 Ohio St. 208; *Railway Co. v. Iron Co.*, 46 Ohio St. 44.

⁹ *Jackson v. Jackson*, 17 Ore. 110, 19 Pac. 847; *Freeksen v. Turner*, 19 Ore. 106, 23 Pac. 857.

¹⁰ *Puget Sound Iron Co. v. Worthington*, 2 Wash. Tr. 472, 7 Pac. 882, 886.

can there be said to be any misjoinder of cause of action on this ground.¹¹ In an action to set aside a deed, where there are two grounds set out upon which the deed should be set aside, this fact will not render the pleading vulnerable to a demurrer for uncertainty because the defendants can not ascertain upon which ground the plaintiff will rely.¹² Where a complaint set up two grounds of the cause of action, one, the common counts for money had and received, and the other count, upon which the cause was tried, consisting of a claim for over-drafts of defendant's account with the plaintiff bank, the sustaining of a special demurrer, for uncertainty, to the first count, if erroneous, was not prejudicial error, where it appears from the evidence in the trial of the cause that there could have been no recovery upon the first count, and it appears that both counts were intended to represent the same cause of action.¹³

Enough appearing to render the complaint easy of comprehension, and free from any reasonable doubt, a demurrer for uncertainty will not lie, any more than a demurrer under such circumstances will lie for ambiguity.¹⁴

§ 1012. ——— ACTION FOR SERVICES — FAILURE TO SET FORTH ITEMS. In an action for services performed, or for work and labor done, a complaint which fails to allege the time at which the services are claimed to have been performed, or the date or dates on which the work and labor is claimed to have been done, is not vulnerable to a demurrer for uncertainty;¹ the remedy is by motion for a bill of particulars in this regard.²

¹¹ Redwood City Salt Co. v. Whitney, 153 Cal. 421, 422, 95 Pac. 885 (goods sold and delivered). Cal. 1, 29 Am. St. Rep. 85, 30 Pac. 96.

¹² Murphy v. Crowley, 69 Cal. 133, 136, 10 Pac. 369.

¹³ Consolidated Nat. Bank v. Pacific Coast Steamship Co., 95

¹⁴ See, ante, § 1001, footnote 4.

¹ McFarland v. Holcomb, 123 Cal. 84, 87, 56 Pac. 761.

See, also, ante, § 1006, and post,

§ 1013.

² See, ante, § 1006.

§ 1013. ——— ACTION ON ACCOUNT—ITEMS NOT SET OUT. In an action founded upon an account, the failure of the complaint to set out the items constituting the account, is not vulnerable to a demurrer on the ground of uncertainty;¹ the defendant has his complete remedy in a motion for a bill of particulars.²

§ 1014. ——— CLERICAL ERROR. A mere clerical error in a complaint does not render it demurrable for uncertainty, in those cases in which the error could not mislead the defendant to his prejudice;¹ but it has held to be otherwise where the error is of such a substantial character that were the demurrer overruled and the plaintiff, when his attention was called to the error, refused to amend, any judgment recovered in favor of the plaintiff would be set aside.²

§ 1015. ——— CONTRADICTION ALLEGATIONS. Where a complaint in an action contains conflicting and contradictory statements as to the same cause of action, a demurrer on the ground of uncertainty will be sustained, the same as in the case of an objection on the ground of ambiguity for this cause.¹

§ 1016. ——— DAMAGES FOR CONVERSION—FAILURE TO DESCRIBE THE PROPERTY. In an action to recover damages for the conversion of certain personal property, where the complaint fails to describe the property, alleged to have been converted, objection thereto for uncertainty may be taken by special demurrer.¹

§ 1017. ——— DIVORCE—COMMUNITY PROPERTY. An objection that a complaint in an action for divorce, stating the existence of common property, is uncertain and defective in not stating the facts showing the prop-

¹ See, ante, §§ 1006, 1008, 1012 and authorities.

² See, ante, § 1006.

¹ See, ante, § 1003.

² See, ante, § 1007.

¹ See, ante, § 1004.

¹ Kelly v. Murphy, 70 Cal. 560,

12 Pac. 467.

erty to be common, must be raised by demurrer, or it will be deemed waived.¹

§ 1018. ——— FORECLOSING ASSESSMENT-LIEN—
FAILURE TO SET OUT DATE OF LIEN. Where an action is brought to foreclose an assessment-lien on property,—e. g., an assessment for construction of a sewer,—the failure of the complaint to state the date on which such lien was filed, renders the complaint vulnerable to a special demurrer on the ground of uncertainty.¹

§ 1019. ——— INDUCEMENT TO CONTRACT—SET-
TING OUT. In those cases in which a complaint is demurred to on the ground of uncertainty, because of certain matters contained therein, where it is clearly apparent from the complaint that the cause of action is based upon a written contract, and that the allegations by plaintiff as to membership in the defendant corporation, the issuing of an endowment certificate to her, and her right to participate in the endowment fund, being merely inducement to the contract on which the action is based, does not render the complaint uncertain, and vulnerable to the demurrer.¹

§ 1020. ——— ITEMS OF DAMAGES NOT STATED—
INJURY TO PREMISES AND BUSINESS. In case of an action brought to recover damages for injury to the premises and also for injury to the business of the plaintiff, if the complaint fails to set forth the items of injury to the property, and also the items of injury to the business, claimed to have been sustained by the plaintiff, and which are the foundation of the suit, the complaint will be vulnerable to a demurrer for uncertainty.¹

¹ *Gimmy v. Gimmy*, 22 Cal. 633; *Assoc.*, 100 Cal. 429, 433, 34 Pac. Mini v. Mini, 5 Cal. Unrep. 432, 1089.
45 Pac. 1044.

¹ *Williamson v. Joyce*, 137 Cal. 30 Pac. 762.

151, 153, 69 Pac. 980. ¹ *Mallory v. Thomas*, 98 Cal. 644, 646, 33 Pac. 757.

See, ante, § 983.

¹ *Henke v. Eureka Endowment* See *Lamb v. Harbaugh*, 105 Cal. 680, 690, 39 Pac. 56.

§ 1021. ——— SALE—PURCHASE FROM AGENTS. A complaint for breach of a contract of sale, setting forth that plaintiff had purchased a quantity of goods from A and B, “then and there acting as agent of the defendant,” is only another form of declaring that he had purchased from the defendant, and is sufficiently certain to prevent any misapprehension of its meaning, and is good on demurrer.¹

§ 1022. ——— UNCERTAINTY OF DESCRIPTION—CONJUNCTIVE DEMURRER. A demurrer to a complaint upon the ground that it is ambiguous, unintelligible, and uncertain, for the reason that it does not contain a sufficient description of the property sued for, if in fact the complaint is not ambiguous nor unintelligible, does not raise the question of uncertainty as to the description.¹

§ 1023. ——— STATEMENT OF GROUNDS OF OBJECTION. An objection to a complaint that it is uncertain, can not be reached by a general demurrer;¹ such defects can be taken advantage of by a special demurrer only, pointing out the specific objections to defects relied upon.² Thus, in an action to recover damages for the conversion of certain personal property, an objection to the complaint that it does not describe the property alleged to have been converted with sufficient particularity, must be taken by special demurrer.³

¹ *Greenebaum v. Taylor*, 102 Cal. 624, 36 Pac. 957.

¹ *Cochran v. Goodman*, 3 Cal. 245; *Greenebaum v. Taylor*, 102 Cal. 624, 36 Pac. 957.

See, ante, § 1000.

¹ *Phelps v. Owens*, 11 Cal. 25; *Slattery v. Hall*, 43 Cal. 195; *Berry v. Cammet*, 44 Cal. 352; *Reynolds v. Hosmer*, 45 Cal. 630; *Chase v.*

Avery, 58 Cal. 352; *Ward v. Clay*, 82 Cal. 502, 505, 23 Pac. 50, 227.

² *Ward v. Clay*, 82 Cal. 502, 505, 23 Pac. 50, 227; *Neves v. Costa*, 5 Cal. App. 111, 89 Pac. 861; *Carpenter v. Smith*, 20 Colo. 39, 31 Pac. 789; *Palmer v. Utah & N. R. Co.*, 2 Idaho (West Pub. Co. Ed.) 290, 293, 13 Pac. 425.

³ *Kelly v. Murphy*, 70 Cal. 560, 12 Pac. 462.

II. Plaintiff's Grounds of Demurrer.

§ 1024. **IN GENERAL.** The plaintiff's demurrer being the same in its nature, and similar in the purposes which it serves, to the demurrer of the defendant,¹ it follows that the rules as to what is admitted by a defendant's demurrer,² and the like, apply with equal force to plaintiff's demurrers. These rules have been already treated with sufficient fullness, and need not be reiterated here. The plaintiff's demurrer, like the defendant's demurrer, is regulated by the procedural code, in which the grounds of demurrer are specified. These grounds were amended by the legislature of 1906-7³ by separating ground three, to wit, "that the answer is ambiguous, unintelligible and uncertain," and making separate grounds of each.⁴

§ 1025. **GROUND OF DEMURRER.** In California, the plaintiff may demur upon any one or more of the following grounds:

- I. That (1) several causes of counter-claims have been improperly joined, or (2) are not separately stated;
- II. That the answer does not state facts sufficient to constitute (1) a defense, or (2) a counter-claim;
- III. That the answer is ambiguous;
- IV. That the answer is unintelligible; or
- V. That the answer is uncertain.¹

§ 1026. — **NO OTHER GROUNDS OF DEMURRER.** The demurrer of the plaintiff, like the demurrer of the defendant,¹ is limited to the causes or grounds stated in the code provision set out in the last section. Thus, the fact that an answer fails to separately state causes of defense is not ground of demurrer under the statute;² this vice must be reached by motion to strike out, or some other

¹ See, ante, § 911.

² See, ante, § 872.

³ See, ante, § 1000.

⁴ See Kerr's Cyc. Cal. Consolidated Supp. 1906-1913, p. 1464.

¹ Kerr's Cyc. Cal. Code Civ. Proc., 2d ed., § 444, Consolidated Supp. 1906-1913, p. 1464.

¹ See, ante, § 914.

² See, ante, § 1025.

appropriate motion or proceeding.³ Likewise the fact that inconsistent allegations or denials are made in an answer, is not ground for objection by demurrer on the part of the plaintiff,⁴ for the defendant is permitted to set forth as many defenses in the answer as he may have to the cause of action, even though they be inconsistent.⁵ And a demurrer will not lie to a portion of a defense or counter-claim,⁶ it must be directed to the whole pleading or to the whole count.⁷

§ 1027. SUFFICIENCY OF DEMURRER—IN GENERAL. It has already been noted that a demurrer will not lie to a portion of an answer, or to a part of a cause of defense or of counter-claim in the answer;¹ hence, a demurrer to all that portion of an answer following a designated line on a named page, is insufficient, and will be overruled;² so also will a demurrer to an answer, setting up but one cause of defense, which separates it into two defenses and demurs to each separately, for the connected structure of pleadings can not be thus destroyed at the pleasure of an opposition pleader, and its disconnected averments separately demurred to.³

Clear, definite and certain as the demurrer of a defendant must be the demurrer of a plaintiff, and where the plaintiff's demurrer is so indefinitely and uncertainly stated as to render it impracticable to determine to what portion of the defense or answer it relates, it will be disregarded;⁴ so also will a demurrer denominating an answer as a defense, instead of a counter-claim, where

³ Hagely v. Hagely, 68 Cal. 348, 349, 9 Pac. 305.

⁴ Caldwell v. Ruddy, 2 Idaho (West Pub. Co. Ed.) 5, 1 Pac. 339.

⁵ American Nat. Bank v. Donnellan, 170 Cal. 9, 148 Pac. 188; Dibble v. Reliance Life Ins. Co., 170 Cal. 199, 149 Pac. 171.

⁶ Ferrier v. Ferrier, 64 Cal. 23, 27 Pac. 960.

⁷ See, post, § 1027, footnotes 2 and 3.

¹ See, ante, § 1026, footnote 6.

² Locke v. Peters, 65 Cal. 161, 162, 3 Pac. 657.

³ Herfort v. Cramer, 7 Colo. 483, 4 Pac. 896.

⁴ Carman v. Ross, 64 Cal. 249, 29 Pac. 510.

both the counsel and the trial court treated the demurrer as attacking the pleading as a counter-claim instead of a defense.⁵

§ 1028. — IN THE LANGUAGE OF THE STATUTE. A demurrer to a counter-claim, specifying the objection to the answer in the language of the statute, to wit, that it “does not state fact sufficient to constitute a counter-claim,” is sufficient.¹

§ 1029. — WHERE WHOLE ANSWER ATTACKED. In those cases in which the whole answer is attacked by the demurrer, it will be properly overruled when any of the allegations therein constitute a good defense,¹ whether well pleaded or not. Thus, where an answer contains (1) a denial of the plaintiff’s claim, and (2) a counter-claim, a demurrer interposed to the whole answer, which is good as to the counter-claim, but not good as to the denial, should be overruled.²

Defenses so commingled difficult to separate them, a demurrer to the whole on the ground that they do not state facts sufficient to constitute a cause of defense is sufficient to present such issue of law;³ and where an answer sets out (1) a denial of the plaintiff’s ownership, and (2) a plea of fraud, but does not separately state them, and the fraud is insufficiently pleaded, this renders the whole answer vulnerable to a demurrer on the ground (1) that it does not state facts sufficient to constitute a defense, and (2) that it is ambiguous, unintelligible and uncertain.⁴

⁵ Power v. Sla, 24 Mont. 243, 61 Pac. 468.

¹ Power v. Sla, 24 Mont. 243, 61 Pac. 468.

¹ St. Vrain Stone Co. v. Denver, U. & P. R. Co., 18 Colo. 211, 32 Pac. 827; Downing v. Haas, 33

Colo. 344, 81 Pac. 33; Ingersoll v. Davis, 14 Wyo. 120, 82 Pac. 687.

² Eich v. Greeley, 112 Cal. 171, 173, 44 Pac. 483.

³ Bon Homme County v. Berndt, 15 S. D. 494, 90 N. W. 147.

⁴ Sukeforth v. Lord, 87 Cal. 399, 405, 25 Pac. 497.

§ 1030. JOINT DEMURRER. A joint demurrer by two or more plaintiffs to an answer is governed by the same rules of law as is a joint demurrer by defendants;¹ and where the answer states a good defense or valid counterclaim against either of the plaintiffs, the demurrer must be overruled.²

§ 1031. SUSTAINING DEMURRER—EFFECT OF. Sustaining a demurrer to an answer has the same effect as sustaining a demurrer to a complaint; that is, it is an adjudication of the law-point raised, and where a party is thus ruled out of a litigation,—e. g., a land contest,—his objections to subsequent proceedings can not be considered.¹ Where a demurrer is sustained to that part of an answer which attempted to set up a defense to plaintiff's right of action, such ruling will be held tantamount to overruling a demurrer merely, where the facts so alleged do not set up, or attempt to set up, a defense to the action, but merely show the equitable right of the defendant.²

§ 1032. WAIVER OF OBJECTION—FAILURE TO DEMUR, ETC. The plaintiff, like the defendant, may waive his ground of demurrer, and will be deemed to have done so under like conditions and circumstances. All objections to answer must be taken in the trial court, where amendment may be made, or they are deemed waived; they can

¹ See, ante, § 957.

² *Neumann v. Monetti*, 146 Cal. 25, 79 Pac. 510.

¹ *Ramsey v. Flournoy*, 58 Cal. 260, 262; *Morgan v. Bonyng*, 157 Cal. 300, 107 Pac. 315.

As to right to appeal as a party interested or injured, see note 119 Am. St. Rep. 743.

Distinguishes in *Jacobs v. Walker*, 3 Cal. Unrep. 865, 33 Pac. 91, holding that the fact that plaintiff's application to purchase state land, of some portion of which he

was in possession, had been adjudged invalid, and determined that he had no right to purchase, makes him none the less a proper party to a proceeding to determine a contest inaugurated in the surveyor general's office against the purchase of the land by the defendant, following *Garfield v. Wilson*, 74 Cal. 175, 15 Pac. 620; *Perri v. Beaumont*, 91 Cal. 30, 27 Pac. 534.

² *Laurent v. Lanning*, 32 Ore. 11, 51 Pac. 80.

not be taken for the first time on appeal.¹ Thus, the sufficiency of the defense,² criticism of the form in which the denials or defenses are pleaded,³ inconsistency of the defenses put forward,⁴ sufficiency of the allegation of fraud,⁵ and uncertainty in the denial in the answer,⁶ are all waived by going to trial without demurrer. The plaintiff also waives his objection taken by a demurrer to the answer by filing an answer to the cross-complaint of the defendant,⁷ or by proceeding to trial without a hearing and ruling on his demurrer.⁸

¹ *Green v. Lake Superior & Pacific Fuse Co.*, 46 Cal. 408, 409; *White v. San Rafael & S. Q. R. Co.*, 50 Cal. 417, 419.

² *Moore v. Campbell*, 72 Cal. 251, 13 Pac. 689.

³ *Green v. Lake Superior & Pacific Fuse Co.*, 46 Cal. 408.

⁴ *Uridias v. Morrell*, 25 Cal. 31, 37.

See *Klink v. Cohen*, 13 Cal. 623.

⁵ *King v. Davis*, 34 Cal. 100, 106;

Lee v. Figg, 37 Cal. 328, 335, 99 Am. Dec. 271; *Hutchings v. Castle*, 48 Cal. 152, 156; *Bull v. Ford*, 66 Cal. 176, 4 Pac. 1175; *Sukeforth v. Lord*, 87 Cal. 399, 403, 25 Pac. 497.

⁶ *Harney v. McLeran*, 66 Cal. 34, 36, 4 Pac. 884.

⁷ *Booth v. Chapman*, 59 Cal. 149, 152.

⁸ *Fincher v. Malcolmson*, 96 Cal. 38, 42, 30 Pac. 835. See *McCarthy v. Yale*, 39 Cal. 585, 586; *Wilcox v. Lang*, 78 Cal. 118, 125, 20 Pac. 297.

CHAPTER VIII.

ANSWER—IN GENERAL: DEFENSES, DENIALS, ETC.

- § 1033. In general.
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§ 1033. IN GENERAL. The answer is the defendant's plea to the merits of the action. In those cases in which

the defendant does not demur to the complaint, or, having demurred, the plaintiff having filed and served an unobjectionable complaint, his only alternative method of defense is to answer the complaint by matter of fact. In the ordinary sense, an answer means a reply. In pleading it may be a reply which either (1) admits or denies the facts alleged in the complaint, or (2) it may admit, and then avoid the effect of the admission by making a counter-statement. In either case the object of an answer is to make an issue. Without an issue no trial can be had, because there is no question of difference between the plaintiff and defendant; in other words, plaintiff asks for nothing which defendant refuses to grant him.

The object of an answer is to plainly notify the court and the opposite party of the facts relied upon as a defense, so that the plaintiff may be prepared to meet them if he can. The testimony must then be confined to these allegations.¹

§ 1034. ANSWER DEFINED. An answer of a defendant, as the term is used in law, is a statement in writing,¹ of the defendant's defense or defenses to the cause of action of the plaintiff, as set forth in the complaint;² in other words, is a confutation of what the plaintiff has alleged.³ In the law of pleading, an answer includes both denials and defenses, and may consist of a denial or denials, or of a defense or defenses, only, or of both denials and defenses.⁴ An answer, to be sufficient, must contain (1) a denial, general or special, of each material allegation contained in the complaint and controverted by the defen-

¹ *Knahtla v. Oregon Short-Line & W. N. R. Co.*, 23 Ore. 136, 27 Pac. 91; *Troy Laundry Co. v. Henry*, 23 Ore. 232, 31 Pac. 484. *Larrabee*, 33 Me. 100, 102; *Talbott v. Garretson*, 31 Ore. 256, 49 Pac. 978.

² *Larrabee v. Larrabee*, 33 Me. 100, 102.

³ *Larrabee v. Larrabee*, 33 Me. 100, 102.

⁴ *Schmidt v. McCaffrey*, 34

⁵ *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905; *Larrabee v.* Misc. (N. Y.) 693, 70 N. Y. Supp. 1011.

dant, or of any knowledge or information thereof sufficient to form a belief; and (2) a statement of any new matter constituting (a) a defense or defenses, (b) a counter-claim or set-off, or (c) a cross-complaint.⁵ It is no part of the office of an answer to demand affirmative relief, except in those cases in which new matter is set up in which affirmative relief is sought;⁶ and an answer can not be made to take the place and serve the purpose of a motion requiring that new parties, necessary to the full adjudication of the cause,⁷ be brought in.⁸

§ 1035. DEFENSE DEFINED—AT COMMON LAW. At common law a defense consisted of the denial of the truth or validity of the claim of the plaintiff as set forth in the complaint, and did not signify merely a justification. It consisted of a general assertion that the plaintiff had no ground of action, which assertion was afterwards made and maintained in the body of the plea. This was so essential in pleading that if no defense were stated in the commencement of the plea, though the plea were in other respects sufficient, judgment was given against the defendant. In other words it was the *contestatio litis*,—contestation of suit,—of the civil law.¹

§ 1036. — UNDER PROCEDURAL CODES. Under the procedural codes, the word “defense” is not used in its technical sense, and has no relation to that part of the answer in which there is a denial only of the facts stated in the complaint; but is, in legal language, a full answer to the whole or to some part of the plaintiff’s demand,¹ and

⁵ *Singer v. Effler*, 16 Misc. (N. Y.) 334, 39 N. Y. Supp. 720.

⁶ *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905; *Bendit v. Annesley*, 42 Barb. (N. Y.) 192, 27 How. Pr. 184.

⁷ As to bringing in new parties, see, ante, §§ 647-650.

⁸ *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905.

¹ 3 Bl. Com. 296; 1 Chitty on Pleading (16th Am. Ed.), p. 444; Co. Litt. 127b; Gould on Pleading, ch. 2, § 6; Maxwell on Code Pleading, p. 384.

¹ *Wehle v. Butler*, 35 N. Y. Super. Ct. Rep. (3 Jones & S.) 1, 12 Abb. Pr. N. S. 139, 43 How. Pr. 5; affirmed 61 N. Y. 245.

applies to every matter tending to diminish or entirely defeat the plaintiff's cause of action,² including all statements of new matter constituting a complete or partial bar to the plaintiff's recovery,—such as payment, partial or in full; justification, and the like.³ Defenses under the procedural codes are of two classes: (1) Those which deny some or all of the material allegations on the part of the plaintiff, and (2) those which confess and avoid some or all of the plaintiff's claims.⁴

§ 1037. **ANSWER—IN GENERAL.** The general principles and rules of pleading, already fully discussed,¹ apply to answers equally with complaints, as to the statements of fact,² conclusions of the pleader³ or of law,⁴ redundant and irrelevant or unnecessary matter,⁵ the pleading of conditions precedent, and the like. The answer should be concise and precise, definite and certain, in all matters of denial and of allegation of new matter.

§ 1038. — **INQUIRIES OF COUNSEL BEFORE ANSWERING.** Defendant's counsel, when about to make answer to a complaint, inquires:

1. Has any wrong been alleged in the complaint?
2. Does the complaint charge the defendant with the commission of the wrong?
3. Is defendant liable to the extent alleged in the complaint?
4. Has defendant a counter-claim?
5. Was the injury done within the Statute of Limitations?

² *Baier v. Humpall*, 16 Neb. 127, 20 N. W. 108.

³ *Hubber v. Pullen*, 9 Ind. 273, 68 Am. Dec. 620; *Bush v. Prosser*, 11 N. Y. 347, 352, reversing 13 Barb. 22; *Ross v. Longmuir*, 15 Abb. Pr. (N. Y.) 326, 24 How. Pr. 49; *Houghton v. Townsend*, 8 How. Pr. (N. Y.) 441.

⁴ *Donovan v. Main*, 74 App. Div. (N. Y.) 44, 11 N. Y. Ann. Cas. 180, 77 N. Y. Supp. 229.

¹ See, ante, §§ 704-746.

² See, ante, §§ 711 et seq.

³ See, ante, § 714.

⁴ See, ante, § 715.

⁵ See, ante, § 728.

6. Did the defendant do the wrong?

And these inquiries will suggest to the pleader what answer will raise an issue, or the appropriate issue. In all cases a defense should be so pleaded, that, being admitted as pleaded, judgment must go for the defendant, and this rule is especially rigid in pleading fraud or a forfeiture.¹

§ 1039. — FORMAL PARTS OF ANSWER. The formality and formal parts of an answer, including its caption or title, venue, commencement, and the like, are substantially the same as are these parts of the complaint of the plaintiff, which have already been fully discussed,¹ and do not require to be repeated in this place.² The requirements as to subscription and verification, where the complaint is verified, are the same as in the case of a complaint.³

§ 1040. — CONTENTS OF BODY OF ANSWER—IN CALIFORNIA. The procedural codes in the various jurisdiction employ different and variant language in describing and designating what the body of the answer shall contain. These can not be set out and discussed in this place.¹ In California, the answer of the defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant.
2. A statement of any new matter constituting a defense² or counter-claim.

If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant.

¹ Greiss v. State Investment & Ins. Co., 98 Cal. 241, 33 Pac. 195.

¹ See, ante, §§ 812 et seq.

² Form as to formal parts of answer is found in Jury's Adjudicated Forms of Pleading and Practice, vol. I, p. 52, Form No. 43, p. 58; Forms Nos. 64, 65.

³ See, ante, §§ 777 et seq.

¹ Analysis of the various provisions is very satisfactorily and exhaustively made by Mr. Jury, in his Adjudicated Forms of Pleading and Practice, vol. I, pp. 50, 51.

² Defense defined, ante, §§ 1035, 1036.

If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground.

If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint.³

§ 1041. — FORMAL DEFECTS TO BE OBJECTED TO BY ANSWER WHEN. In those cases in which any of the matters for which a demurrer will lie to a complaint¹ do not appear upon the face of the complaint, the objection may be taken by answer.²

§ 1042. — INSURANCE COMPANY'S ANSWER—PERIL EXCEPTED. In California, in an action against an insurance company to recover upon a contract of insurance wherein the defendant claims exemption from liability upon the ground that, although the proximate cause of the loss was a peril insured against, the loss was remotely caused by or would not have occurred but for a peril excepted in the contract of insurance, the defendant shall in his answer set forth and specify the peril which was the proximate cause of the loss, in what manner the peril excepted contributed to the loss or itself caused the peril insured against, and if he claim that the peril excepted caused the peril insured against, he shall in his answer

³ Kerr's Cyc. Cal. Code Civ. Proc., § 437.

Form of answer by sole defendant, see *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 52, Form No. 44.

Form of answer of defendant sued in wrong name, *Id.*, Form No. 45.

Form of answer by husband and wife sued jointly, *Id.*, p. 53, Form No. 47.

Form of answer by infant, *Id.*, Form No. 48; p. 58, Form No. 65.

Form of answer by insane person, *Id.*, p. 54, Form No. 49; p. 58, Form No. 64.

¹ As to grounds of demurrer by defendant to the complaint, see, ante, §§ 912 et seq.

² Kerr's Cyc. Cal. Code Civ. Proc., § 433.

set forth and specify upon what premises or at what place the peril excepted caused the peril insured against.¹

§ 1043. — TIME IN WHICH TO ANSWER—AFTER DEMURRER DISPOSED OF. In those cases in which a demurrer is filed to the complaint, the demurrer is considered as an “answer” under proceedings relative to default,¹ and the defendant will not be in default until after the demurrer is disposed of;² and when the demurrer is disposed of, the defendant may make his answer, filing the original with the clerk of the court in which the action is brought, and serving a copy upon the adverse party or his attorney;³ or where answer is not filed and served, the court may grant the defendant time in which to answer, imposing such terms as are just, in its discretion.⁴ When a demurrer is interposed and overruled, the question of time to answer and terms are chiefly regulated by the rules and discretion of the court in which the cause is pending.⁵ For if the demurrer is deemed frivolous, terms will be imposed before answer is allowed. Such a rule is required to prevent demurrer from becoming a means of delay only, and if the court does not fix the time within which answer in such case must be filed, the defendant

¹ Kerr's Cyc. Cal. Code Civ. Proc., 2d ed., § 437a, Consolidated Supp. 1906-1913, p. 1460.

² Oliphant v. Whitney, 34 Cal. 25; Winter v. Winter, 8 Nev. 129, 136.

Entry of default prerequisite to an entry of judgment on the cause on overruling of a demurrer, it not being a judgment on failure to “answer.”—Winter v. Winter, 8 Nev. 129, 136.

³ Id.; Smith v. Clyne, 16 Idaho 468, 101 Pac. 819; Dible v. Hanson, 17 N. D. 23, 114 N. W. 372.

⁴ Kerr's Cyc. Cal. Code Civ. Proc., §§ 465, 472.

⁴ See Kerr's Cyc. Cal. Code Civ. Proc., §§ 432, 472, 473. See, also, Mamus v. Hamblon, 38 Cal. 539.

⁵ Kerr's Cyc. Cal. Code Civ. Proc., §§ 472, 473, 1054 as amended 1915, Kerr's Cyc. Bien. Supp. 1915, p. 3135; Thornton v. Borland, 12 Cal. 438; McDonald v. Hope Min. Co., 48 Fed. 593, 594.

Meritorious defense must be set up to entitle defendant to have his answer filed.—Thornton v. Borland, 12 Cal. 438, 439; Williamson v. Joyce, 140 Cal. 669, 671, 74 Pac. 290.

should answer within the same time as in case of service of copy of the original complaint.⁶

§ 1044. ——— IN ABSENCE OF DEMURRER. The time within which the defendant shall appear and plead or demur, or in the absence of a demurrer shall answer, is fixed by the procedural codes in the various jurisdictions; but the statutory time within which to answer may always be extended by the trial court or judge in each jurisdiction.¹ In reference to the time in which the answer must be filed, courts will take judicial notice of the territorial extent of the jurisdiction and sovereignty exercised de facto by their own government, and of the local divisions of the country into states, counties, cities, towns, etc.² When the defendant, on motion being decided in his favor, is allowed time to answer until the plaintiff elects on which count of the complaint he will go to trial, the plaintiff should serve a copy of the amended complaint with the notice of his election.³ And if an answer has been already filed, it may be allowed by order of the court to stand as the answer to such amended complaint, and it shall be treated as if filed when the order is made.⁴ If the defendant should fail to answer in the time specified in the summons, it is not an unsound exercise of discretion in the court to refuse him leave to file an answer which does not show a meritorious defense.⁵ An order or a stipulation extending the time within which to answer to and including a specified day which falls on Sunday, or other nonjudicial day, entitles the defendant to answer at any time during the succeeding Monday or judicial day.⁶

⁶ *People v. Rains*, 23 Cal. 128.

See note 89 Am. Dec. 676.

¹ In California the rule will be found set forth in Kerr's Cyc. Cal. Code Civ. Proc., §§ 472, 473, 1054, Kerr's Cyc. Cal. Bien. Supp. 1915, p. 3135.

³ *Wilson v. Cleaveland*, 30 Cal. 192, 89 Am. Dec. 85.

⁴ *Mulford v. Estudillo*, 32 Cal. 131.

⁵ *Hallowell v. Page*, 24 Mo. 590; *Page v. Page*, 24 Mo. 595.

² See *People v. Smith*, 1 Cal. 9; *Brumagim v. Bradshaw*, 39 Cal. 24, 40.

⁶ *Blackwood v. Cutting Packing Co.*, 71 Cal. 461, 12 Pac. 493;

Or the fact that an answer is not filed until after the expiration of the time for answering does not render the filing a nullity, and where the answer seeks affirmative relief, a judgment of dismissal of the action by the plaintiff is void.⁷

In Arizona, the defendant is required to appear and answer or demur within twenty days from the date on which the summons is served upon him.⁸

In California, the procedural code provides that the defendant shall appear and plead or answer the allegations in the complaint within ten days, where the summons is served within the county in which the action is commenced, and within thirty days where the summons is served elsewhere,⁹ or by publication.¹⁰ Under the California practice, the defendant may file an appearance, and answer immediately after suit brought, and without service of process, if he so desires, thus joining issue at once.¹¹

In New York, the defendant must answer within the statutory time, or such further time as he may obtain by order.¹²

In Oregon, when an answer is not filed within the time limited, the proper practice is to apply to the trial court for a default or judgment for want of an answer.¹³

*The Washington statute*¹⁴ fixes the time for answer in response to summons as twenty days in all cases.¹⁵

Crane v. Crane, 121 Cal. 99, 100, 53 Pac. 433.

Extension of time to and including a designated date on which to answer, the date fixed on being a holiday and the next day Sunday, defendant may answer on the succeeding Monday.—Crane v. Crane, 121 Cal. 99, 53 Pac. 433.

⁷ Acock v. Halsey, 90 Cal. 215, 27 Pac. 193.

⁸ Ariz. Comp. Laws, p. 400, § 152.

⁹ Kerr's Cyc. Cal. Code Civ. Proc., § 407, subd. 2.

¹⁰ See, ante, § 206.

¹¹ See, ante, §§ 255-288.

¹² See New York Code Civ. Proc., §§ 520, 781, 782.

¹³ Gaines v. Cyrus, 23 Ore. 403, 31 Pac. 833.

¹⁴ Wash. Laws 1893, p. 407.

¹⁵ McMaster v. Advance Thrasher Co., 10 Wash. 147, 38 Pac. 760.

§ 1045. — ANSWER BY GUARDIAN OR ATTORNEY. In some jurisdictions the procedural codes have provisions regulating answers by guardians of infants and other incompetent persons, and by attorneys appointed for defendants who are in prison. In the case of infant defendants, in some jurisdictions, infancy must be pleaded and proved,¹ whether set up as a direct defense or interposed collaterally;² while in other jurisdictions the defense is admissible under a plea of the general issue.³

In Colorado, it is the duty of the court to protect an infant or other incompetent defendant. Where an infant appears by his next friend or by a guardian ad litem appointed by the court, as the code requires,⁴ and a pleading is filed by such next friend or guardian ad litem in which the infant defendant's rights are surrendered or his interest jeopardized, such answer will not be considered by the court.⁵

In Kansas, the guardian for an infant defendant is required to file a general denial of the material allegations in the complaint, but while his failure to do so is error, it is not a jurisdictional defect.⁶ Where the cause of action is founded upon a written instrument, the execution of the instrument is admitted, unless denied under oath.⁷ In other jurisdictions the mere formal answer, required by the statute of an infant by his guardian, is not required to be verified.⁸

In Kentucky, no judgment can be rendered against an infant until his general guardian, or a guardian ad litem appointed by the court, shall have made a defense, or shall have filed with the court a report stating that, after

¹ *Pitcher v. Laycock*, 7 Ind. 398.

² *La Grange College Institute Trustees v. Anderson*, 65 Ind. 367, 30 Am. Rep. 224.

³ *Thrall v. Wright*, 38 Vt. 494.

⁴ Colo. Code, §§ 7, 8.

⁵ *Seaton v. Tohill*, 11 Colo. App. 211, 53 Pac. 170.

⁶ *Sartwood v. Sage*, 68 Kan. 817, 75 Pac. 508.

⁷ *McLean v. Webster*, 45 Kan. 664, 26 Pac. 10.

⁸ *Eakin v. Hawkins*, 52 W. Va. 124, 43 S. E. 211.

a careful examination of the cause, he is unable to make a defense.⁹ A report by such guardian that he has no defense to make, does not comply with the requirements of the statute as to a careful examination of the cause, and a judgment thereon will be erroneous;¹⁰ otherwise where the report shows such an examination;¹¹ but the answer or report of a warning ordering an attorney, can not be taken as the requisite answer or report of a guardian.¹² Hence, where no answer is filed, and no report complying with the requirements of the statute is made, infant defendants do not waive or lose any ground of defense they may have by a failure to answer.¹³

In Ohio, the answers of such defendants, through their guardian, are required to deny all material allegations in the complaint prejudicial to the defendant; and the guardian must bring the rights of the defendant properly before the court by a denial or otherwise.¹⁴ An allegation of insufficient information as to the merits of the alleged cause of action to answer the allegations in the complaint, and praying to have the rights of the defendant protected by the court, has been construed to be, in effect, a general denial.¹⁵ In those cases in which the record shows that the trial court treated the answer of the guardian as a general denial, a judgment will not be disturbed, even though the answer did not expressly deny the allegations of the complaint.¹⁶

§ 1046. — JOINT ANSWER—EFFECT OF. In those cases in which several defendants are sued jointly, and one answers setting up a defense common to them all, the

⁹ Ky. Civ. Code Proc., § 36, subsec. 3.

¹⁰ *Womble v. Price's Guardian*, 112 Ky. 533, 66 S. W. 370.

¹¹ *Ramsey v. Keith's Admr.*, 25 Ky. L. Rep. 582, 76 S. W. 142.

¹² *Totum v. Gibbs*, 19 Ky. L. Rep. 695, 41 S. W. 565.

¹³ *Beadles v. Jones*, 9 Ky. L. Rep. 986, 7 S. W. 916.

¹⁴ *Long v. Mulford*, 17 Ohio St. 484.

¹⁵ *Wood v. Butler*, 23 Ohio St. 520.

¹⁶ *Randall v. Turner*, 17 Ohio St. 262.

defense thus set up by the one defendant will inure to all the defendants.¹ And where an answer is filed by a codefendant within due time, on behalf of all the defendants, denying all knowledge respecting the material allegations in the complaint, averring that a named codefendant, a resident in a designated city of another state, "alone can and will fully answer," and asking for further time to enable such codefendant to answer, is a sufficient joint answer to prevent a default and to restrain the clerk of the court from entering a judgment by default.²

The common-law rule was that where codefendants plead a joint defense which is good as to one or more of the defendants, and bad as to one or more of them, the defense is bad as to all, and this rule has been enforced in some cases in the procedural code states;³ but the better doctrine is thought to be that, under the procedural codes, a joint defense, and especially a joint equitable defense, may be sufficient as to one defendant and insufficient as to others,⁴—e. g., where two persons are sued jointly upon a judgment theretofore recovered against them jointly, and plead, by way of a cross-complaint, that a named one of the defendants was not served with process and did not appear in the former action, such plea is sufficient as to the defendant who was not served in the former action, whether it shows a sufficient defense as to the defendant who was served or not.⁵ Where several defendants are sued jointly in trespass, and file a joint answer in confession and justification, this will not preclude them from taking advantage of the fact that the

¹ *Sprague v. Childs*, 16 Ohio St. 299; judgment reversed on another point, 82 U. S. (15 Wall.) 539, 21 L. Ed. 228.
² *Porter v. Bichard*, 1 Ariz. 87, 520, 530, 20 Am. St. Rep. 290, 24 Pac. 530.
³ *Deitsch v. Wiggins*, 1 Colo. 37.

⁴ *Wilson v. Hawthorn*, 14 Colo. 520, 530, 20 Am. St. Rep. 290, 24 Pac. 548.

⁵ *Id.*

evidence fails to show a joint liability on their part.⁶ In those cases in which an infant is a defendant in an action at law or a suit in equity, and he has no separate or special defense, no separate answer by such defendant is necessary; he may join in the general answer of the defendants.⁷

§ 1047. DEFENSES—IN GENERAL. The effect of filing a joint defense by codefendants has already been discussed.¹ The proofs which the defendant may introduce to maintain the defense set up being limited to the averments in the answer,² it follows that the defendant should set forth the true nature of his defense in his answer.³ Where the pleadings are verified, every matter of defense not directly responsive to the allegations of the complaint must be set up in the answer;⁴ or it may be addressed to part of the complaint, and must be so stated.⁵ If the complaint contains two counts, and the answer takes issue on the allegation of one only, plaintiff is entitled to judgment on the other.⁶ Equitable defenses

⁶ *Mau v. Stoner*, 15 Wyo. 109, 87 Pac. 434, 89 Pac. 466.

⁷ *Western Lumber Co. v. Phillips*, 94 Cal. 54, 29 Pac. 328.

¹ See, ante, § 1046.

² *Turner v. Black Warrior, The*, 1 McAll. 181, Fed. Cas. No. 14253.

³ *Walton v. Minturn*, 1 Cal. 362; *Piercy v. Sabin*, 10 Cal. 22, 30, 70 Am. Dec. 697; *Atchison, T. & S. F. R. Co.*, 5 Neb. 125; *Bishop v. Stevens*, 31 Neb. 786, 791, 48 N. W. 827; *Prall v. Peters*, 32 Neb. 832, 834, 49 N. W. 767; *Singer v. Salt Lake City Copper Mfg. Co.*, 17 Utah 143, 157, 70 Am. St. Rep. 776, 53 Pac. 1024.

⁴ *Terry v. Sickles*, 13 Cal. 427; *Hawkins v. Borland*, 14 Cal. 413. See *Naylor v. Lewiston & S. E. Electric R. Co.*, 14 Idaho 789, 804,

96 Pac. 573, 578; *Globe v. Dillon*, 86 Ind. 327, 336, 44 Am. Rep. 308, 315.

Action on account stated, the complaint being verified, and the answer not setting up either fraud or mistake, evidence that the items of the account are overcharged, is inadmissible.—*Terry v. Sickles*, 13 Cal. 427, 430; *Auzerais v. Naglee*, 74 Cal. 60, 75, 15 Pac. 371; *Hendy v. March*, 75 Cal. 566, 568, 17 Pac. 702; *Fleischner v. Kubli*, 20 Ore. 328, 338, 25 Pac. 1086.

⁵ *Nichols v. Dusenbury*, 2 N. Y. 283; *Foster v. Hazen*, 12 Barb. (N. Y.) 547; *Kneedler v. Sternberg*, 10 How. Pr. (N. Y.) 67.

⁶ *Leffingwell v. Griffing*, 31 Cal. 231; *Oberndorffer v. Moyer*, 30 Utah 332, 84 Pac. 1105.

may be set up in an action of a legal nature.⁷ Whether an answer states a purely legal or an equitable defense, must be determined by the answer itself, and not from the findings of the court.⁸ An issue of law and fact should not be mixed in an answer.⁹ In the natural order of business it is the duty of the court first to try and decide upon an equitable defense, before proceeding with the action at law.¹⁰ Though two defenses, separately pleaded, may be inconsistent, the plaintiff can not disregard them, or either of them, on the trial; and there is no distinction in this respect between verified and unverified pleadings.¹¹

⁷ *Dobson v. Pearce*, 12 N. Y. 156, 1 Abb. Pr. 97, 62 Am. Dec. 152, affirming 8 N. Y. Super. Ct. Rep. (1 Duer) 142, 10 N. Y. Leg. Obs. 170; *Crary v. Goodman*, 12 N. Y. 266, 64 Am. Dec. 506, reversing 9 Barb. 657; *Burget v. Bissell*, 3 N. Y. Code Rep. 215, 5 How. Pr. 192; *Miller v. Platt*, 12 N. Y. Super. Ct. Rep. (5 Duer) 272, 284.

⁸ *Bodley v. Ferguson*, 30 Cal. 511.

⁹ *Brooks v. Douglass*, 32 Cal. 208; *Gould v. Williams*, 9 How. Pr. (N. Y.) 51.

Law and fact involved, it will be presumed, on appeal, that the issue of law was previously disposed of before the trial on the fact, or that law issue was withdrawn.—*Brooks v. Douglass*, 32 Cal. 208, 212; *Silcox v. Lang*, 78 Cal. 118, 125, 20 Pac. 297; *Smith v. Clyne*, 16 Idaho 470, 101 Pac. 820; *Evans v. Jones*, 10 Utah 182, 183, 37 Pac. 262.

See, ante, §§ 878, 879.

¹⁰ *Martin v. Zellerbach*, 38 Cal. 300; *Schieffery v. Tapia*, 68 Cal. 184, 188, 8 Pac. 878; *Swasey v. Adair*, 88 Cal. 179, 180, 181, 23 Pac. 1119; *American Nat. Bank v.*

Donnellan, 170 Cal. 9, 15, 148 Pac. 188; *Cotton v. Butterfield*, 14 N. D. 469, 105 N. W. 236.

Equitable counterclaim interposed by answer, it should be tried and disposed of before the issues of law.—*Cotton v. Butterfield*, 14 N. D. 469, 105 N. W. 236.

Error in order of trial not ground for a reversal where substantial justice is done.—*Schieffery v. Tapia*, 68 Cal. 184.

—A mere irregularity, in no way prejudicial to the plaintiff, to submit the whole case to the jury before disposing of the equitable issues.—*American Nat. Bank v. Donnellan*, 170 Cal. 9, 15, 148 Pac. 188.

Right to jury trial not lost by interposition of equitable and legal issues in the trial.—*Swasey v. Adair*, 88 Cal. 179.

¹¹ *Buhne v. Corbett*, 43 Cal. 264; *McDonald v. Southern Cal. R. Co.*, 101 Cal. 206, 213, 35 Pac. 643, 646; *Banter v. Siler*, 121 Cal. 414, 418, 53 Pac. 935; *Ray v. Moore*, 24 Ind. App. 480, 490, 56 N. E. 937; *Detroit Heating & Lighting Co. v. Stevens*, 20 Utah 241, 247, 58 Pac. 193.

See *Bell v. Brown*, 22 Cal. 678.

As to inconsistent defenses, see, post, §§ 1049, 1050.

*In pleading an ordinance*¹² or enactment founded upon a statute, in an action on contract, which is in violation of said ordinance, it is not necessary to plead the statute specially.¹³ In Indiana, where an answer is founded on a written instrument, a copy of the instrument must be annexed.¹⁴

In California, when a written instrument is so pleaded the genuineness and due execution of such instrument shall be deemed admitted unless plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same.¹⁵ But not by a failure to controvert the same on oath, as prescribed in section four hundred and forty-eight and section four hundred and forty-seven, unless the party controverting the same is, upon demand, permitted to inspect the original before filing such affidavit. The execution of the writing sued upon is put in issue by the plea of the general issue.¹⁶ It has been held in some of the cases that if a defendant sets up a contract which is required to be in writing he must so state it, or his answer is insufficient;¹⁷ but the better doctrine is thought to be that such an answer will be sufficient as against a demurrer, because, the court, as against a demurrer, will presume contracts to be in writing which the law requires to be in writing in order to be legal and binding.¹⁸

§ 1048. — AS TO MANNER OF PLEADING DEFENSES. An affirmative defense, to be available, must be pleaded;¹ and a defense should be so pleaded that, being admitted as

¹² See, ante, § 727.

¹³ *Beman v. Tugnot*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 153.

¹⁴ *Seawright v. Coffman*, 24 Ind. 414.

¹⁵ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 448; *Garcelon, In re*, 104 Cal. 570.

¹⁶ *Gray v. Tunstall*, 1 Hempst. 558, Fed. Cas. No. 5730.

¹⁷ *Taylor v. Hillary*, 1 Gale (Eng. Exch.) 22.

¹⁸ See *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384; *Logan v. Brown*, 20 Okla. 342, 20 L. R. A. (N. S.) 298, 95 Pac. 444.

See, also, ante, § 992.

¹ See *Morehaut v. Wilson*, 52 Cal. 263, 268; *Greiss v. State Investment & Ins. Co.*, 98 Cal. 241,

pleaded, judgment must go for the defendant; and this rule is especially rigid in defenses of fraud, forfeiture, and the like.²

§ 1049. INCONSISTENT DEFENSES — CALIFORNIA RULE. Under the California procedural code and practice, and in jurisdictions having a similar code provision and following the same practice, inconsistent defenses may be separately pleaded,¹ where each defense is complete in itself,² and the defendant can not be compelled to elect upon which of such inconsistent defenses he will stand,³ unless it be in those cases in which the defenses are so inconsistent and conflicting that if the truth of one be admitted it will disprove the other.⁴ The denials in one

244, 33 Pac. 195; *Salem v. Connecticut Fire Ins. Co.*, 41 Mont. 351, 355, 109 Pac. 432; *Smith v. Mutual Cash Guaranty Fire Ins. Co.*, 21 S. D. 433, 442, 113 N. W. 94.

See, post, § 1051.

² *Greiss v. State Investment & Ins. Co.*, 98 Cal. 241, 244, 33 Pac. 195.

¹ CAL.—*Bell v. Brown*, 22 Cal. 671, 678; *Wilson v. Cleaveland*, 30 Cal. 192, 200, 89 Am. Dec. 85; *Buhne v. Corbett*, 43 Cal. 264, 269; *Eppinger v. Kendrick*, 114 Cal. 620, 625, 46 Pac. 613; *American Nat. Bank v. Donnellan*, 170 Cal. 9, 148 Pac. 188; *Dibble v. Reliance Life Ins. Co.*, 170 Cal. 199, 149 Pac. 171. COLO.—*People ex rel. Crawford v. Lathrop*, 3 Colo. 428, 449; *Tucker v. Edwards*, 7 Colo. 209, 3 Pac. 233; *Conrey v. Nichols*, 35 Colo. 473, 84 Pac. 470. NEV.—*Clarke v. Lyon County*, 7 Nev. 75, 81. S. D.—*Stebbins v. Lardner*, 2 S. D. 127, 140, 48 N. W. 847; *Lawrence v. Peck*, 3 S. D. 645, 648, 54 N. W. 808. WYO.—*Lake*

Shore & M. S. R. Co. v. Warren, 3 Wyo. 134, 137, 6 Pac. 724. FED.—*Bachman v. Everding*, 1 Sawy. 70, 72, Fed. Cas. No. 708; *Hummel v. Moore*, 25 Fed. 380.

In Oregon defendant may join defenses and denials, but that if they are inconsistent, the denials must be qualified.—*Veasey v. Humphreys*, 27 Ore. 515, 520, 41 Pac. 8.

² *People ex rel. Crawford v. Lathrop*, 3 Colo. 428, 449; *Reid v. Huston*, 55 Ind. 173; *National Bank v. Green*, 33 Iowa 140.

³ *Lawrence v. Peck*, 3 S. D. 645, 648, 54 N. W. 808; *Detroit Heating & Lighting Co. v. Stevens*, 20 Utah 241, 247, 58 Pac. 193.

⁴ *Pavey v. Pavey*, 30 Ohio St. 600, 601; *Seattle Nat. Bank v. Carter*, 13 Wash. 281, 289-291, 48 L. R. A. 177, 43 Pac. 381.

"This much must be demanded, at least, that however diversified the answers (defenses) may be, they must all contain the essential elements of truth, and if the admission of the truth of one

defense are not affected or qualified by inconsistent affirmative matter in another defense.⁵ A plea or defense containing several matters, these several matters should not be repugnant or inconsistent in themselves;⁶ but the plea or defense, regarded as an entirety, if it be otherwise sufficient in form and substance, is not to be defeated or disregarded merely because it is inconsistent with some other plea or defense;⁷ and there is no distinction in this rule between pleadings which are verified and unverified pleadings.⁸ Thus, in an action in ejectment, the defendant may deny the plaintiff's title, and also plead the statute of limitations;⁹ or a defendant may deny a trust relation, and plead the statute of limitations.¹⁰ Admission by a defendant in one cause of defense, is not evidence against him on the issue raised by another and a separate defense.¹¹ Thus, where, in an

answer (defense) necessarily proves the falsity of another," they can not be allowed to stand.—*Seattle Nat. Bank v. Carter*, 13 Wash. 281, 289, 297, 48 L. R. A. 177, 43 Pac. 331.

⁵ *Billings v. Drew*, 52 Cal. 565, 568; *Botto v. Vandament*, 67 Cal. 332, 334, 7 Pac. 753; *Shepherd-Teague Co. v. Hermann*, 12 Cal. App. 394, 402, 107 Pac. 622.

⁶ *Hensley v. Tartar*, 14 Cal. 503; *Bell v. Brown*, 22 Cal. 671; *Buhne v. Corbett*, 43 Cal. 264; *People ex rel. Crawford v. Lathrop*, 3 Colo. 428; *Tucker v. Edwards*, 7 Colo. 209, 3 Pac. 233.

By the common-law rule, under the statute of Anne, and under the procedural codes of the various states having the reformed judiciary, alike, a single plea or defense is required to be consistent within itself. — See authorities above cited and *Ansley v. Bank of Piedmont*, 113 Ala. 467, 21 So. 39;

McIlroy v. Buckner, 35 Ark. 555; *Porter v. McCreedy*, 1 N. Y. Code Rep. (N. S.) 88; *Buddington v. Davis*, 6 How. Pr. (N. Y.) 401; *Hillebrant v. Booth*, 7 Tex. 490.

⁷ *Buhne v. Corbett*, 43 Cal. 264, 269.

⁸ *Id.*; *Bell v. Brown*, 22 Cal. 672; *Wilson v. Cleaveland*, 30 Cal. 192; *McDonald v. Southern Cal. R. Co.*, 101 Cal. 206, 213, 35 Pac. 643, 646.

Verified answer should be consistent.—*Hayes v. Silver Creek & Panoche Land & W. Co.*, 136 Cal. 238, 241, 68 Pac. 704.

⁹ *Wilson v. Cleaveland*, 30 Cal. 192, 200, 89 Am. Dec. 85.

¹⁰ *Irwin v. Holbrook*, 32 Wash. 349, 73 Pac. 360.

¹¹ *McDonald v. Southern Cal. R. Co.*, 101 Cal. 206, 212, 35 Pac. 643, 646; *Miles v. Woodward*, 115 Cal. 308, 316, 46 Pac. 1076; *Lake Shore & M. S. R. Co. v. Warren*, 3 Wyo. 134, 137, 6 Pac. 724.

action for the alienation of affections, the defendant pleads a general denial and also the acquiescence of the plaintiff, the latter plea and defense is not an admission for the purposes of the trial.¹² New or affirmative matter set up, in the appropriate manner, as a defense, does not constitute a waiver of the effect of a denial contained in another portion of the answer.¹³ Thus, in California, the effect of the denial of possession in one defense is not waived by the setting up of affirmative matter, admitting possession, in another defense, and the admission made in the affirmative defense can not relieve the plaintiff of the burden of proving the matters denied in the first defense;¹⁴ although a different rule prevails in South Dakota¹⁵ and in Washington.¹⁶

§ 1050. ——— "INCONSISTENT DEFENSES" DEFINED—
LIMITATION OF RULE. Inconsistent defenses have been said to be such as are repugnant and contradictory in fact, not by implication; that defenses are inconsistent in fact when one contradicts the other, only. Where there is a seeming and logical inconsistency, which arises merely from a denial and a plea in confession and avoidance, or a plea of confession and justification, such defenses are not conflicting and repugnant, and may stand together.¹ So long as different defenses are consistent with the truth, they may be pleaded together. If two or more defenses may each be true, they can not be said to be inconsistent in the sense that prohibits their standing together. De-

See notes 40 Am. Dec. 465; 76 Am. Dec. 479.

¹² Rudd v. Dewey, 121 Iowa 454, 459, 96 N. W. 973, 975.

¹³ Buhne v. Corbett, 43 Cal. 264, 269; Billings v. Drew, 52 Cal. 565, 568.

¹⁴ Buhne v. Corbett, 43 Cal. 264, 269; Miles v. Woodward, 115 Cal. 308, 316, 46 Pac. 1076.

¹⁵ McLaughlin v. Alexander, 2 S. D. 226, 236, 49 N. W. 99.

¹⁶ Seattle Nat. Bank v. Carter, 13 Wash. 281, 289, 48 L. R. A. 177, 43 Pac. 331.

¹ Wilson v. Cleaveland, 30 Cal. 192; Lawrence v. Peck, 3 S. D. 645, 54 N. W. 808; Irwin v. Holbrook, 32 Wash. 349, 73 Pac. 360.

See Bliss on Code Pleading, 3rd ed., § 343.

fenses which are inconsistent in the sense that they are so repugnant and contradictory that they can not both stand together, are those in which the proof of one necessarily disproves the other, or where if one be true the other can not be.² In an early California case it is said that the inconsistent defenses which are allowed to be pleaded in a verified answer are not such as require in their statement a direct contradiction of any fact elsewhere directly averred; but that they are those in which the inconsistency arises rather by implication of law, being in the nature of pleas in confession and avoidance as contradistinguished from denials; where the party impliedly or hypothetically admits, for the purpose of that particular defense, a fact which he notwithstanding insists does not exist;³ that if a fact, which is directly averred in one part of a verified pleading, is in another part directly denied, the party verifying is guilty of perjury, because both can not be true, and that on the trial that averment which bears most strongly against the pleader will be taken as true.⁴

In harmony with the rule elsewhere is the doctrine above announced to the effect that the test as to whether "inconsistent" defenses may be pleaded together and be permitted to stand, is the question whether both may be true in fact, and if they may be, they may stand together; but that if one is true and the other false in fact, or if the proof of one would disprove the other, the answer is bad, as the defenses are so repugnant and contradictory that they can not stand together.⁵ In other words, where

² Irwin v. Holbrook, 32 Wash. 349, 73 Pac. 360. See Seattle Nat. Bank v. Carter, 13 Wash. 281, 48 L. R. A. 177, 43 Pac. 331; Davis v. Seattle Nat. Bank, 19 Wis. 65, 52 Pac. 526.

³ Bell v. Brown, 22 Cal. 671, 678.

⁴ Bell v. Brown, 22 Cal. 671, 678.

⁵ See, among other cases: MINN.

—Booth v. Sherwood, 12 Minn. 426; Gammon v. Ganfield, 42 Minn. 368, 44 N. W. 125; Backdahl v. Grand Lodge A. O. U. W., 46 Minn. 61, 48 N. W. 454; Steenerson v. Waterbury, 52 Minn. 211, 53 N. W. 1146. MO.—Nelson v. Brodhack, 44 Mo. 596, 100 Am. Dec. 328; Keane v. Kyne, 2 Mo. App. 317;

a defendant has several defenses on the facts, he may set them all up in his answer.⁶

§ 1051. — OMISSION TO PLEAD DEFENSE—EFFECT OF. We have already seen that to be available a defense must be pleaded,¹ for a defense not pleaded can not be considered, although shown by the evidence,² because not a matter in issue. The rule as to curing defects by litigating a matter without objection, applies to a pleading that is defective, only, not where there is a total absence of averment.³ Thus, fraud can not be shown where not set up as a defense.⁴ Where a defendant has an opportunity to present his defense and neglects to do so, the judgment or decree of the court will be binding upon him in a collateral proceeding.⁵ And we shall see in later sections

Schaefer v. Causey, 8 Mo. App. 142; Patrick v. Boonville Gaslight Co., 17 Mo. App. 465; Lee v. Dodd, 20 Mo. App. 271; Moore v. Macon Sav. Bank, 22 Mo. App. 684; Wood v. Hilbish, 23 Mo. App. 389; McCormick v. Kaye, 41 Mo. App. 263; Grier Commission Co. v. Dockstader, 47 Mo. App. 42; Seiter v. Bischoff, 63 Mo. App. 157. NEB.—Blodgett v. McMurtry, 39 Neb. 210, 57 N. W. 985; Home Fire Ins. Co. v. Decker, 55 Neb. 346, 75 N. W. 841; Cate v. Hutchinson, 58 Neb. 232, 78 N. W. 500. N. Y.—Hopper v. Hopper, 11 Pal. Ch. 46; Hollenbeck v. Clow, 9 How. Pr. 289; Bryant v. Bryant, 25 N. Y. Super. Ct. Rep. (2 Robt.) 612. OHIO.—Pavey v. Pavey, 30 Ohio St. 600. ORE.—McDonald v. American Mortg. Co., 17 Ore. 626, 21 Pac. 883; Snodgrass v. Andross, 19 Ore. 236, 23 Pac. 969. S. D.—Lawrence v. Peck, 3 S. D. 645, 54 N. W. 808. WASH.—Seattle Nat. Bank v. Carter, 13 Wash. 281, 48 L. R. A. 177, 43 Pac. 331; Davis

v. Seattle Nat. Bank, 19 Wash. 65, 52 Pac. 526; Irwin v. Holbrook, 32 Wash. 349, 73 Pac. 360; Hart-Parr Co. v. Keeth, 62 Wash. 464, Ann. Cas. 1912D, 243, 114 Pac. 169. WYO.—Lake Shore & M. S. R. Co. v. Warren, 3 Wyo. 134, 6 Pac. 724. FED.—Great Western Coal Co. v. Chicago G. W. R. Co., 39 C. C. A. 79, 22 Fed. 274; Lee Line Steamers v. Robinson, 134 C. C. A. 287, L. R. A. 1916C, 358, 218 Fed. 559.

See exhaustive note covering the whole subject of "inconsistent defenses" in 48 L. R. A. 177-210.

⁶ See, post, §§ 1053-1055.

¹ See, ante, § 1048, footnote 1.

As to what must be pleaded, see, post, § 1086.

² Wilson v. White, 84 Cal. 239, 24 Pac. 114.

³ Id.

⁴ Id. See Gardner v. First Nat. Bank, 10 Mont. 149, 153, 25 Pac. 29.

⁵ Morrill v. Morrill, 20 Ore. 96, 25 Pac. 362.

that if a defendant has an opportunity in a suit to present as a defense, or as a partial defense, affirmative matter relating to and growing out of the same transaction, and fails to do so, any claim he may have on that account will be barred.⁶

§ 1052. — **SHAM DEFENSES—STRIKING OUT.** We have already discussed, to a limited extent, sham answers or defenses.¹ A sham answer or defense is one which is good in form, but false and untrue in fact,² does not really involve any matter of substantial litigation,³ is interposed in bad faith,⁴ and put in for the purpose of delay

⁶ See, post, §§ 1086, 1173, 1183.

Under Kentucky statute providing that an answer may contain as many matters of estoppel and avoidance, and as many traverses as there are grounds for, a defendant who fails to make as many consistent defenses (see post, § 1054) as he has, loses such of his defenses as he neglects to set up.—*Asher v. Uhl*, 29 Ky. L. Rep. 396, 93 S. W. 29.

¹ See, ante, § 739. See, also, post, §§ 1087 et seq.

² *Piercy v. Sabin*, 10 Cal. 22, 29, 70 Am. Dec. 692; *Greenbaum v. Turrill*, 57 Cal. 285, 287; *State v. Weber*, 96 Minn. 422, 113 Am. St. Rep. 630, 105 N. W. 490; *Lefferts v. Snediker*, 1 Abb. Pr. (N. Y.) 41.

Defense taking issue upon immaterial averment of complaint, and sets up new and irrelevant matter, is sham.—*Davis v. Potter*, 2 N. Y. Code Rep. 99, 4 How. Pr. 155.

Distinguished from frivolous answer or defense in that a frivolous answer or defense denies no material averment in the complaint and sets up no relative new matter in defense.—*Brown v. Jen-*

ison, 1 N. Y. Code Rep. (N. S.) 156, 157, 5 N. Y. Super. Ct. Rep. (3 Sandf.) 732; *Lefferts v. Snediker*, 1 Abb. Pr. (N. Y.) 41; *Andrae v. Bandler*, 56 N. Y. Supp. 614.

New matter essential to a sham answer. An answer is not sham simply because false, and known to the defendant to be so, if it omits to set up new matter.—*Caswell v. Bushnell*, 14 Barb. (N. Y.) 393, 7 How. Pr. 171.

³ *People v. McCumber*, 18 N. Y. 315, 321, 72 Am. Dec. 515.

⁴ CAL.—*Piercy v. Sabin*, 10 Cal. 22, 29, 70 Am. Dec. 692. COLO.—*Cochrane v. Parker*, 5 Colo. App. 527, 39 Pac. 361. KAN.—*Bartholomew, In re*, 41 Kan. 273, 21 Pac. 275. NEB.—*Upton v. Kennedy*, 36 Neb. 66, 53 N. W. 1042. N. Y.—*Brown v. Jenison*, 1 N. Y. Code Rep. 156, 157, 5 N. Y. Super. Ct. Rep. (3 Sandf.) 732; *Struver v. Ocean Ins. Co.*, 2 Hilt. 475, 9 Abb. Pr. 23; *Littlejohn v. Greeley*, 13 Abb. Pr. 311, 22 How. Pr. 345; *Garvey v. Cowler*, 6 N. Y. Super. Ct. Rep. (4 Sandf.) 665; *Hull v. Smith*, 8 N. Y. Super. Ct. Rep. (1 Duer) 649. N. C.—*Howell v.*

merely, or for some other unworthy object.⁵ A defense manifestly false and sham, will be stricken out on motion under the California procedural code and codes having similar provisions;⁶ but to authorize such striking out, the defense must be clearly false and sham.⁷ To warrant this summary disposition of a defense or answer it must be so manifestly and palpably false and untrue that the trial judge will assume it to be so;⁸ that is, the mere reading of the pleading must be sufficient to disclose, without deliberation and beyond a doubt, that the defense is sham.⁹ An answer so framed that it does not set up a valid defense, but stating facts which might, were they properly pleaded, constitute a defense, can not be regarded as sham.¹⁰ A mere general denial, it has been said, may come within the definition of a sham answer or

Ferguson, 87 N. C. 113, 114, 115. N. D.—Gjerstadengen v. Hartzell, 8 N. D. 424, 79 N. W. 872. FED.—Terre Haute, City of, v. Farmers' Loan & T. Co., 40 C. C. A. 117, 99 Fed. 838.

⁵ Patrick v. McManus, 14 Colo. 65, 20 Am. St. Rep. 253, 23 Pac. 90; Darrow v. Miller, 3 N. Y. Code Rep. 241, 5 How. Pr. 247; Seward v. Miller, 6 How. Pr. (N. Y.) 312.

Denial of ownership of note sued on, and that plaintiff is real party in interest, merely without setting up any facts justifying such denial, is a sham answer in an action on a promissory note alleged to have been executed by the defendant in favor of the plaintiff as payee.—See Berry v. Barton, 12 Okla. 221, 66 L. R. A. 513, 71 Pac. 1074.

See note 66 L. R. A. 513.

Sham Defenses deferred and discussed.—72 Am. Dec. 521, 113 Am. St. Rep. 639.

⁶ Kerr's Cyc. Cal. Code Civ. Proc., § 453; Gostorfs v. Taafe, 18 Cal. 385, 388; Patrick v. McManus, 14 Colo. 65, 20 Am. St. Rep. 253, 23 Pac. 90.

As to striking out sham defenses, see notes 72 Am. Dec. 521-524, 113 Am. St. Rep. 639.

Not every false plea can be stricken out upon motion supported by affidavit, as thus would be to substitute a trial to the court upon affidavits for a jury trial.—Patrick v. McManus, 14 Colo. 65, 20 Am. St. Rep. 253, 23 Pac. 90.

⁷ Andreae v. Bandler, 56 N. Y. Supp. 614.

⁸ Cottrill v. Cramer, 40 Wis. 555, 559; Witherell v. Wiberg, 4 Sawy. 232, 15 Abb. L. J. 392, Fed. Cas. No. 17917.

⁹ Morton v. Jackson, 2 Minn. 219, 220; Cottrill v. Cramer, 40 Wis. 555, 559.

¹⁰ Struver v. Ocean Ins. Co., 2 Hilt. (N. Y.) 475, 9 Abb. Pr. 23, 27.

defense, and be stricken out, although verified;¹¹ but a verified answer can not be stricken out where it sets up a sufficient defense, whether such defense consists simply in a denial or denials, or in an affirmative defense.¹² Thus, a plea to the general issue, or a plea which is the equivalent of and serves the purpose of the common-law plea of the general issue and puts the plaintiff to his proof, can not be stricken out as sham,¹³ because the defendant has the legal right to put the plaintiff to the proof of his demand, and to urge that he establish it by evidence admissible for that purpose.¹⁴

§ 1053. — SEVERAL GROUNDS OF DEFENSE—CALIFORNIA RULE. In California the defendant may set forth by answer as many defenses and counter-claims as he may have. They must be separately stated, and the several defenses must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished.¹ The defendant not only may, but is required to, under penalty of loss of right therein,—set up any counter-claim arising out of the transaction set out in the complaint as the foundation of the plaintiff's action.² Similar provisions exist in the procedural codes of other states. Thus, the Colorado procedural code provides that the defendant may set forth in his answer as many defenses and counter-claims

¹¹ *Nelson Lumber Co., C. N. v. Richardson*, 31 Minn. 267, 17 N. W. 388.

¹² *Greenbaum v. Turrill*, 57 Cal. 285, 287.

Denying certain allegations in the complaint, and setting up no new matter, and affirming nothing to be true, can not be stricken out as sham.—*Morton v. Jackson*, 2 Minn. 219, 220.

¹³ *Fay v. Cobb*, 51 Cal. 315; *Greenbaum v. Turrill*, 57 Cal. 285, 288; *Wayland v. Tysen*, 45 N. Y.

281, reversing *Wayland v. Lysen*, 9 Abb. Pr. N. S. (N. Y.) 79; *Thompson v. Erie R. Co.*, 45 N. Y. 468; *Fellows v. Mueller*, 38 N. Y. Super. Ct. Rep. (6 Jones & S.) 137, 139, 48 How. Pr. 82.

¹⁴ *Fay v. Cobb*, 51 Cal. 315; *Wayland v. Tysen*, 45 N. Y. 282.

¹ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 441.

² *Kerr's Cyc. Cal. Code Civ. Proc.*, 2d ed., § 439. *Kerr's Cyc. Cal. Consolidated Supp.* 1907-1913, p. 1462.

as he may have, whether the subject matters of such defenses be such as were heretofore denominated legal or equitable, or both; they shall be separately stated; and the several defenses shall refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished.³ Under this statute it is held that, to be available as a defense to an action, each ground of defense set up must be complete in itself, and be a full answer to the cause of action to which it is interposed.⁴

§ 1054. — SPECIAL DEFENSES—CONFESSION AND AVOIDANCE. We have already discussed inconsistent defenses, and the right to plead them in the same answer,¹ pointed out what inconsistent defenses are not permitted under the rule,² set out the statutes of California and Colorado especially providing that the defendant may set up as many defenses, counter-claims and sets-off as he may have, which come within the provisions of the statute,³ and noted the fact that in all jurisdictions having the reformed procedure like statutes exist.

Pleas in confession and avoidance may be given a little more attention in this place; that is, pleas where a general denial is first entered, and then new matter of defense pleaded by way of avoidance or in justification. The logic of the old common-law pleas in bar admitted the material allegations of the plaintiff, but pleaded *actio non quia* the new matter constituting a conclusive answer or defense to the action upon the merits. In a technical sense the new matter thus pleaded was inconsistent with the general denial;⁴ but latterly was never

³ Colo. Code Civ. Proc., § 65.

dies and Remedial Rights, §§ 716-719.

⁴ *Weston v. Esty*, 22 Colo. 334,

45 Pac. 367; *Travelers' Ins. Co. v.*

Redfield, 6 Colo. App. 190, 40 Pac.

195.

¹ See, ante, § 1049.

² See, ante, § 1050.

³ See, ante, § 1053.

See: *Bliss on Code Pleading*,

3d ed., § 346; *Pomeroy on Reme-*

⁴ 1 *Chitty on Pleading* (16th Am. ed.), p. 551.

held to be so inconsistent as not to be pleaded together, unless there was an absolute incompatibility of facts; that is, where the admission of the one would necessitate the rejection of the other, or the proof of the one would disprove the other.⁵ The same rule holds true under the provisions of the procedural codes. If we were to limit the statutory provisions allowing inconsistent defenses to the strict logic of the old common-law pleas in bar, all special defenses would be cut off when there is a general denial entered to the plaintiff's cause of action; because such new matter setting up the special defense which is a complete bar to the cause of action on the merits, is technically supposed to confess and avoid, when, as a matter of fact, there may be no confession at all. Such an interpretation of the statutes giving to the defendant a right to plead as many defenses as he may have has never been adopted. The defendant is universally granted his clear right to plead several defenses—every lawful defense, counter-claim and set-off—which are not inconsistent within the degree of prohibition above pointed out.⁶

Consistency of defenses relates to fact merely; means accordant, compliable, not contradictory;⁷ that is, defenses which are not inconsistent with each other in fact, without reference to the technical conclusions or implications of the law which may arise or be drawn therefrom; if both may be true, they are consistent within the rule, and may be pleaded together.⁸ This is thought to

⁵ See discussion and authorities, ante, § 1050; also, *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328.

⁶ See discussion and authorities, ante, § 1050.

⁷ See *O'Malley v. Luzerne County*, 3 Kulp (Pa.) 41, 46.

⁸ See, ante, § 1050; also, *Smith v. Doherty*, 109 Ky. 616, 60 S. W.

380; *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328; *McAdow v. Ross*, 53 Mo. 199; *Patrick v. Boonville Gaslight Co.*, 17 Mo. App. 462; *State to use of Cooley v. Samuels*, 20 Mo. App. 649; *Moore v. Macon Sav. Bank*, 22 Mo. App. 684; *Deering v. Collins*, 38 Mo. App. 80; *McCormick v. Kay*, 41 Mo. App. 263; *Grier Commission*

be the universal rule,—in those jurisdictions having the reformed procedure, at least.⁹

§ 1055. ——— REASON FOR THE RULE. It has been well said that it is not consistent with the spirit and intention of the procedural codes that a defendant having two good and lawful defenses, without knowing which one is, in fact or in law, the true defense, shall, at his peril, be compelled to elect between them on which he will rely to the exclusion of the other, in advance of the trial and introduction of the evidence;¹ and that in those cases in which, from the nature of the cause, it is uncertain which one of two or more defenses is the proper one, the defendant may set up in his answer all those defenses which can be verified without the one falsifying the other.² We have already seen that each defense so pleaded must be complete in itself;³ but the rule as to inclusion by reference and adoption of matters already set out,⁴ applies in stating or pleading such separate defenses,—although the practice is not approved for the reasons heretofore assigned.⁵ Where two or more defenses are set up, they

Co. v. Dockstrader, 47 Mo. App. 42; Nelson v. Wallace, 48 Mo. App. 193; Cohn v. Lehman, 93 Mo. 574, 6 S. W. 267; Gaar v. Black, 120 Mo. App. 181, 96 S. W. 683; Atterbury v. Hendricks, 127 Mo. App. 47, 106 S. W. 111; Lake Shore & M. S. R. Co. v. Warren, 3 Wyo. 134, 6 Pac. 724.

⁹ See the authorities cited in the footnotes to this section and the sections therein referred to, and, among other cases: MO.—Rhine v. Montgomery, 56 Mo. 566; Smith v. Culligan, 74 Mo. 378; State ex rel. Davis v. Rogers, 79 Mo. 283; Springer v. Kleinsorge, 83 Mo. 152; Ledbetter v. Ledbetter, 88 Mo. 60; Hurt v. Ford, 142 Mo. 283, 41 L. R. A. 823, 44 S. W. 228; Wood v. Hilbish, 23

Mo. App. 389; Cavitt v. Tharp, 30 Mo. App. 131; State ex rel. Taylor v. Moss, 35 Mo. App. 441; Hax v. Acme Cement Co., 82 Mo. App. 447; Bay v. Trusdell, 92 Mo. App. 377; Ryan v. Riddle, 109 Mo. App. 115, 82 S. W. 1117. NEB.—Home Ins. Co. v. Decker, 55 Neb. 346, 75 N. W. 481; Western Travelers' Accident Assoc. v. Thomson, 72 Neb. 661, 101 N. W. 341. OHIO.—Pavey v. Pavey, 3 Ohio St. 600. ORE.—Veasey v. Humphrey, 27 Ore. 515, 41 Pac. 6. FED.—Davis v. Shafer, 50 Fed. 764.

¹ Kinkead's Code Pleading, § 78.

² See, ante, § 1050; Citizens' Bank v. Colson, 29 Ohio St. 78, 81.

³ See, ante, § 1049, footnote 2.

⁴ See, ante, § 730.

⁵ Id.

must be separately stated;⁶ in some jurisdictions they are required to be separately stated and numbered, although it has been said that if they are separately stated, this will be a sufficient compliance with the requirement as to separately stating and numbering, although the paragraphs are not numbered.⁷

§ 1056. DENIALS—IN GENERAL. It has already been seen¹ that the answer of the defendant shall contain: (1) A general or specific denial of the material allegations of the complaint controverted by the defendant, and (2) a statement of any new matter constituting a defense, counter-claim or set-off. Under the California procedural code² there are three forms in which the defendant can controvert the allegations in a verified complaint: (1) Positively,—when the facts are within his personal knowledge; (2) according to information and belief,—when the facts are not within his personal knowledge, but he has information regarding them, and (3) that he has no information or belief enabling him to answer the allegations of the complaint,—when he has neither knowledge nor any information.³ If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint.⁴ A general denial is a denial in gross of

⁶ See, ante, § 1053.

⁷ Mundy v. Wright, 26 Kan. 173.

¹ See, ante, § 1034.

² Kerr's Cyc. Cal. Code Civ. Proc., § 437.

³ Curtis v. Richards, 9 Cal. 33; San Francisco Gas Co. v. San Francisco, City of, 9 Cal. 453.

⁴ Kerr's Cyc. Cal. Code Civ. Proc., § 437.

See, also, Naftzger v. Gregg, 99 Cal. 83, 87, 37 Am. St. Rep. 23, 33 Pac. 757; Puget Sound Iron Co. v. Worthington, 2 Wash. Tr. 472, 7 Pac. 882, 886.

all the allegations of the complaint.⁵ Such a denial only puts in issue the allegations of the complaint.⁶ Under the California procedural code,⁷ if the complaint be verified, the answer must contain a specific denial of each allegation controverted. The mere form of the denial is not material, provided it directly traverses the allegation which it is intended to meet.⁸ “The defendant for answer says he denies,” etc., is in form of expression unexceptional, and the court will not call in question the fact of denial.⁹ A general denial which “denies each and every allegation alleged in said complaint” is sufficient.¹⁰ But a denial of each and every material allegation of complaint is bad, as being evasive.¹¹ The legal effect of such denials is not changed by expressions showing that they were intended to be specific.¹² The denial should not be of “all the allegations,” but of “each and all,” or “each and every,” and a denial of all the material allegations, though good on demurrer, is not sufficiently certain and specific.¹³ “That no allegation thereof is true,” was recommended by the Code commissioners of New York.¹⁴ “Denies each and every allegation in said complaint contained, not herein specifically admitted or specifically

⁵ *Seward v. Miller*, 6 How. Pr. (N. Y.) 312; *Dennison v. Dennison*, 9 How. Pr. (N. Y.) 246.

⁶ *Grazer v. Clift*, 10 Cal. 303; *Coles v. Soulsby*, 21 Cal. 47; *Stone v. Quaal*, 36 Minn. 46, 29 Minn. 326.

⁷ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 437.

⁸ *Hill v. Smith*, 27 Cal. 476; *Power v. Gum*, 6 Mont. 5, 9 Pac. 575.

⁹ CAL.—*Espinosa v. Gregory*, 40 Cal. 58. KAN.—*Munn v. Taulman*, 1 Kan. 254, 81 Am. Dec. 508. MINN.—*Moen v. Eldred*, 22 Minn. 538. N. Y.—*Jones v. Ludlum*, 74 N. Y. 61.

¹⁰ *Kellogg v. Church*, 3 N. Y. Code Rep. 39, 4 How. Pr. 339; *Rosenthal v. Brush*, 1 N. Y. Code Rep. (N. S.) 228; *Seward v. Miller*, 6 How. Pr. (N. Y.) 312; *Dennison v. Dennison*, 9 How. Pr. (N. Y.) 246.

¹¹ *Mattison v. Smith*, 24 N. Y. Super. Ct. Rep. (1 Rol.) 706, 19 Abb. Pr. 288.

¹² *Hensley v. Tartar*, 14 Cal. 508.

¹³ *Lewis v. —*, 10 Ohio St. 451.

¹⁴ *Report of New York Commission and reasons therefor*, p. 128.

controverted," has been sustained.¹⁵ If several material matters are stated in the complaint conjunctively, an answer which undertakes to deny them as a whole conjunctively stated is evasive, and an admission of the allegation attempted to be denied.¹⁶ If a denial, although informal, has been treated by the parties as sufficient on the trial, the same effect will be given it on appeal.¹⁷ Colorado practice recognizes no general denial or general issue.¹⁸ But in some jurisdictions a general denial in code procedure is deemed equivalent to the general issue at common law.¹⁹ Although the denial in an answer to a complaint may not be as specific as good pleading requires, for the reason that the defendants "say that they deny each and every allegation," yet where there is no motion to make the denial more specific, and it appears from the answer as a whole just what allegations of the complaint are denied and what are admitted, the denial will be held sufficient.²⁰ When a general denial to an unverified complaint is qualified by an exception of "such allegations as are hereinafter admitted, stated, or qualified," it will not control the effect of an affirmative allegation of the answer which, in legal effect, admits the cause of action.²¹ And where the denial is literal and therefore insufficient,²² followed by an affirmative allegation which, if true, the allegations in the

¹⁵ *Griffin v. Long Island R. Co.*, 101 N. Y. 348, 354, 9 N. Y. Civ. Proc. Rep. 84, 4 N. E. 740; *Davison v. Schermerhorn*, 1 Barb. (N. Y.) 480; *Hunt v. Bennett*, 4 E. D. Smith (N. Y.) 647; affirmed 19 N. Y. 173; *Parshall v. Tillou*, 13 How. Pr. (N. Y.) 7.

¹⁶ *Doll v. Good*, 38 Cal. 287.

See, also, post, §§ 1061-1063.

¹⁷ *Hiatt v. Board Trustees School Dist.*, 65 Cal. 481, 4 Pac. 464.

See, also, post, § 1079.

¹⁸ *Watson v. Lemen*, 9 Colo. 200, 11 Pac. 88.

¹⁹ *Louisville & N. R. Co. v. Trammell*, 93 Ala. 350, 9 So. 870; *Perkins v. Ermel*, 2 Kan. 325.

See, also, post, §§ 1059, 1075.

²⁰ *Denver, Town of, v. Spokane Falls, City of*, 7 Wash. 226, 34 Pac. 926.

²¹ *People v. Otto*, 77 Cal. 45, 18 Pac. 869.

²² See, post, § 1063.

complaint can not be true, this affirmative allegation will constitute a "denial" which raises an issue of fact.²³

Explicit denial of material allegations in the complaint is the plaintiff's right; either such a denial or an admission of their truth, either by direct statement or by silence.²⁴ The material allegations are such as the plaintiff must prove on the trial, in order to maintain his action;²⁵ and a denial of such allegations only is sufficient.²⁶ A general denial puts in issue the material allegations of the complaint, only;²⁷ special defenses must be specially pleaded.²⁸ It seems that in New York a general and specific denial of the same matter is not allowed, and one or the other will be stricken out as redundant.²⁹ In Louisiana, under the code of that state, which allows general and special pleas, if not inconsistent with each other, an amended answer which specifies a particular fact in aid of the general denial is allowable.³⁰

Complaint directed against two persons, and the liability of one involves facts which are not material to the liability of the other, and the defendants answer separately, neither defendant is required to answer those material allegations which relate solely to the liability of the other defendant.³¹

§ 1057. — IMMATERIAL ISSUES NEED NOT BE DENIED. A material allegation must be denied or no issue is raised;¹ but immaterial allegations need not be denied. If the plaintiff makes averments in his complaint not

²³ See, post, § 1078, footnotes 5-7, and text going therewith.

²⁴ *De Racouillat v. Rene*, 32 Cal. 450; *Gay v. Winter*, 34 Cal. 153.

²⁵ *Garvey v. Flower*, 6 N. Y. Super. Ct. Rep. (4 Sandf.) 665, 10 N. Y. Leg. Obs. 16.

²⁶ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 437.

²⁷ *Id.*

¹ Code Pl. and Pr.—88

²⁸ See, ante, §§ 1051, 1053-1055.

²⁹ N. Y. Code Civ. Proc., § 500; 1 *Van Santv. Eq. Pl.* 408; *Dennison v. Dennison*, 9 How. Pr. (N. Y.) 246; *Blake v. Elred*, 18 How. Pr. (N. Y.) 240.

³⁰ *Andrews v. Hensler*, 73 U. S. (6 Wall.) 254, 18 L. Ed. 737.

³¹ *Robson v. Superior Court*, 171 Cal. 588, 154 Pac. 8.

¹ See, ante, § 1056.

necessary or material to present his cause of action, or if he avers conclusions of law, or sets out evidence, these need not be traversed, for they are not issuable facts, or, if issuable, they are not pertinent to the case. Because plaintiff makes a history of his complaint, there is no reason, necessity, or excuse for the defendant to deny the truth of that history. Nor is it proper to seek out the very words of the complaint, and then negative each and every one of them. An issue is not as well or as clearly made by negating the language of the complaint in terms as by denying the facts expressed by such language.²

A conclusion of the pleader,³ or a conclusion of law,⁴ should not be pleaded, and when pleaded is ranked with immaterial allegations. A conclusion of the pleader may be correctly or incorrectly drawn, but in any event it is the province of the court, not of the pleader, to draw the conclusions which the facts stated imply or warrant. Mere conclusions without facts are insufficient for any purpose; conclusions from the facts are for the court, and when alleged in the pleadings are immaterial, and may be disregarded; they are never required to be answered or denied. The same is true regarding conclusions of law, and when conclusions of law are alleged by the pleader they do not tender an issue, and may be disregarded; they are never required to be answered.⁵

If plaintiff has been wronged, some one has injured him, and defendant, to make an issue, needs only to deny the ultimate facts. In general, the reasons which caused the injury need not be pleaded. The commission of the injury, the time and place, extent of the injury, and the person who did it, in most cases should be traversed,—e. g., in a case of forcible entry, defendant [*the person*] denies that on the day of, 19.., or at

² See, post, § 1063.

³ See, ante, § 714.

⁴ See, ante, § 715.

⁵ See, post, § 1085.

any other time [*the time*], he broke or entered into the premises described [*the wrong*], or damaged plaintiff in any amount [*extent of injury*]. If, for instance, and which is frequently the case, the plaintiff alleges that at the time stated defendant wrongfully and unlawfully broke, etc., defendant need only deny the breaking; the court will be competent to say whether it was wrongful or unlawful after the proofs are heard. That is what the court is for. The pleader, whether representing plaintiff or defendant, should allege or deny the facts only; the effect of the existence of certain facts is left for the disposition of the tribunal to which the parties appeal for justice.

§ 1058. — KINDS OF DENIALS: AS TO MATTER—SUFFICIENCY OF DENIAL. Denials naturally fall under two general classes, divided (1) according to the matter of the denial, and (2) according to the manner of pleading,—the phraseology,—of the denial. Denials of the first class,—distinguished by the matter of the denial,—are again divided into (1) general denials—in which there is no allegation of the grounds of objection or the particular part of the complaint objected to, and (2) specific or special denials—which may set forth the ground of objection and must specify the particular allegation in the complaint attacked thereby. Under many of the procedural codes the pleader has the option to file a general or a specific denial, unless it be in exceptional instances requiring a specific denial. But in either case the denial must be direct and unequivocal. An averment that “this defendant says he denies” the allegations of the complaint has been held to be sufficient in California,¹ Kansas,² Minnesota³ and New York,⁴ although its sufficiency has been denied;⁵ but an answer which states that

¹ *De Espinosa v. Gregory*, 40 Cal. 58, 62.

² *Munn v. Taulman*, 1 Kan. 254.

³ *Moen v. Eldred*, 22 Minn. 539 (sufficient, but not commendable).

⁴ *Jones v. Ludlum*, 74 N. Y. 61, 62.

⁵ *Arthur v. Brooks*, 14 Barb. (N. Y.) 533; *West v. American Exchange Bank*, 44 Barb. (N. Y.)

it "does not deny or admit" the allegations of the plaintiff's complaint, does not constitute a "general or specific denial," and is insufficient under some of the procedural codes.⁶ And it has been held that under the California code, and under codes having the same, or essentially the same, provisions, a general denial of a verified complaint, with a qualification of "except as hereinafter admitted," is insufficient to put in issue any of the material allegations of the complaint;⁷ but it is held that under the South Dakota procedural code, and codes having the same, or essentially the same, provisions, a general denial followed by "except such as are hereinafter admitted or qualified," is a sufficient denial.⁸ This point of practice has been subject to much discussion and has, apparently, given the courts considerable trouble. The whole question hinges on the particular wording of the statute involved. The general view, in states with code provisions the same or like that of South Dakota, seems to be that, while such a method of pleading should not be encouraged, and while often subject to a motion to make more definite and certain, still, in those cases in which it is reasonably certain and plain what allegations of the complaint are intended to be controverted and what ones admitted, no objection being made to such answer by motion or otherwise, the form of the answer,

175; *Blake v. Eldred*, 18 How. Pr. (N. Y.) 240; *Taylor v. Richards*, 22 N. Y. Super. Ct. Rep. (9 Bosw.) 679; *Mower v. Burdick*, 4 McL. 7, Fed. Cas. No. 9890.

Frivolous, such answers are not necessarily. — *Wall v. Buffalo Water Works Co.*, 118 N. Y. 119-122, reversing *Lawrence v. Williams*, 8 N. Y. Super. Ct. Rep. (1 Duer) 585; *Elton v. Markham*, 20 Barb. (N. Y.) 343; *Livingston v. Hammer*, 20 N. Y. Super. Ct. Rep. (7 Bosw.) 670.

⁶ *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767.

In California this class of denial is especially provided for by the procedural code in the cases specified therein.—See, ante, § 1056.

⁷ *Hensley v. Tartar*, 14 Cal. 508; *Levinson v. Schwartz*, 22 Cal. 229, 83 Am. Dec. 61; *People ex rel. Attorney General v. River Raisin & L. E. R. Co.*, 12 Mich. 389, 86 Am. Dec. 64.

⁸ *Hardy v. Purington*, 6 S. D. 382, 388, 61 N. W. 158.

although not specifically recognized by the procedural code, will be tolerated, and held to raise an issue on such allegations as can fairly be included as objects of the general denial.⁹ Such qualified denials will be restricted to matters not expressly referred to or attempted to be covered by the specific allegations of the answer.¹⁰ A denial of "each and every allegation of the complaint, except what the court may construe to be admitted by the foregoing answer" is bad, being both indefinite and uncertain.¹¹ An answer traversing the allegations in a complaint by denying "that defendant did as therein alleged," is bad.¹² In those cases in which no issue is raised by a defendant's answer, a closing denial, stating that "the defendant denying each and every allegation set forth in the plaintiff's complaint not inconsistent with the foregoing answer," fails to raise an issue.¹³ A denial,

⁹ *Kingsley v. Gilman*, 12 Minn. 515; *Lyde v. Martin*, 16 Minn. 38; *Greenfield v. Massachusetts Mut. Life Ins. Co.*, 47 N. Y. 430; *Parshall v. Tillou*, 13 How. Pr. (N. Y.) 7; *Smith v. Wells*, 20 How. Pr. (N. Y.) 158; *Matteson v. Ellsworth*, 28 Wis. 254.

"The purpose of the answer is to inform the plaintiff of what allegations in his complaint are denied (see, ante, § 1056), so that he may know what he may be prepared, on the trial, to prove. If the answer leave him in doubt, he may move to have it made more definite and certain, or possibly it may be assailed by demurrer; but, if unobjected to in any manner, we think it would be going too far at this time to abruptly hold that such an answer is an admission, instead of a denial, as was evidently intended. There is no doubt that such a form of answer is too often used. The cases

in which it is justifiable, if there are such cases, are exceptional and infrequent, and the better and safer practice is to adhere closely to the precept of the code."—*Hardy v. Purington*, 6 S. D. 388, 61 N. W. 158.

¹⁰ *Althouse v. Jamestown, Town of*, 91 Wis. 46, 64 N. W. 423.

¹¹ *Starbuck v. Dunklee*, 10 Minn. 168, 88 Am. Dec. 68.

"A truthful denial implies that the defendant knows precisely what he is denying. How can he know beforehand what construction will be put upon his pleading by the court?"—*Starbuck v. Dunklee*, 10 Minn. 168, 88 Am. Dec. 68.

¹² *Mier v. Cortledge*, 4 How. Pr. (N. Y.) 107, 108, 7 N. Y. Leg. Obs. 371. Judgment reversed on another point, 8 Barb. 75.

¹³ *Richardson v. Smith*, 29 Cal. 529, 531-2. See: *Salmon v. Olds*, 9 Ore. 488; *Krewson v. Purdom*, 11 Ore. 266, 268, 3 Pac. 822.

whether general or specific, simply puts in issue the allegations of the complaint; the difference between a general denial and a specific denial being merely the extent to which,—and the manner in which,—the plaintiff's allegations are traversed.¹⁴ It is not necessary that a traverse should be in negative words. An averment in an answer of the contrary of that which is alleged in the complaint, is equivalent to a denial;¹⁵ and even where the averments of the answer are not the direct contrary of the averments in the complaint, but are inconsistent with their truth, the answer may, under certain circumstances, be held to raise an issue.¹⁶ Imperfect and defective denials, where acted upon as sufficient at the trial, are in no sense admissions of the allegations of a pleading, which allegations are attempted to be denied;¹⁷ and it can not be contended, for the first time on appeal, that the allegations of the complaint are not denied.¹⁸

Material allegations of complaint must be denied, either positively¹⁹ or upon information and belief;²⁰ and this rule applies to corporations equally with individ-

¹⁴ Coles v. Soulsby, 21 Cal. 47.

¹⁵ Thompson v. Lynch, 29 Cal. 189; McDonald v. Davidson, 30 Cal. 174; Miller v. Brigham, 50 Cal. 615; Perkins v. Brock, 80 Cal. 320, 22 Pac. 194; Churchill v. Bauman, 95 Cal. 541, 30 Pac. 770; Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 922; Loftus v. Fischer, 106 Cal. 616, 39 Pac. 1064; Heaton-Hobson Associated Law Offices v. Arper, 145 Cal. 282, 284, 78 Pac. 721.

See, also, post, § 1078, footnotes 5-7.

¹⁶ Perkins v. Brock, 80 Cal. 320, 22 Pac. 194.

Any allegation in an answer is a denial of the allegations in the

complaint which, if found true, necessarily shows that the allegation of the complaint as to the same matter is untrue.—Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 922.

¹⁷ Loftus v. Fischer, 106 Cal. 616, 618, 39 Pac. 1064; Stockton Combined Harvester & Agricultural Works v. Glenn Falls Ins. Co., 121 Cal. 167, 171, 53 Pac. 561. See, also, post, § 1079.

¹⁸ Id.; Kloppe v. Levy, 98 Cal. 525, 33 Pac. 444.

¹⁹ See, ante, § 1056.

²⁰ San Francisco Gas Co. v. San Francisco, City of, 9 Cal. 453.

As to denial upon information and belief, see, post, §§ 1064-1074.

uals.²¹ A failure to deny a material averment is an admission of the facts contained in such averment, which admission is conclusive against the pleader.²² A denial of the exact value alleged in the complaint of the property sued for, has been said to contain the vice of a negative pregnant, and to be an admission of any less amount;²³ although it has been said, on the other hand, that a general denial of value can not be held to be a negative pregnant, and to amount to an admission of any value whatever;²⁴ but the denial of the value of the property sued for in the terms of the complaint, is evasive and, in fact, no denial at all.²⁵ In a case where the defendant, instead of denying that the property alleged to have been destroyed was of the value of twenty-five thousand dollars, or any other sum greater than the sum of two thousand five hundred dollars, avers that the plaintiff has not sustained damage to exceed the latter sum, it puts in issue the value of the property, or the amount of the damages so far as they are laid at more than the latter sum.²⁶ Such denial should cover the whole ground either of the complaint itself or of that portion of it to which it is intended to apply,²⁷ and present a clear and complete issue in substance as

²¹ *Id.*; *Zany v. Rawhide Gold Min. Co.*, 15 Cal. App. 376, 377, 114 Pac. 1027.

²² 1 *Barber's Chancery Practice* 133; 1 *Van Santv. Eq. Pl.* 398; *Burke v. Table Mountain Water Co.*, 12 Cal. 403; *Blankman v. Vallejo, City of*, 15 Cal. 638; *Patterson v. Ely*, 19 Cal. 28; *Larney v. Money*, 50 Cal. 610; *Lillienthal v. Anderson*, 1 Idaho 678; *Surget v. Byers*, 1 *Hempst.* 715, *Fed. Cas.* No. 13629.

Allegation admitted by defendant plaintiff can not be permitted to deny it. See *dis. op.* in *Burke*

v. McDonald, 2 Idaho (West Pub. Co. Ed.) 310, 319, 13 Pac. 351.

²³ *Blakeman v. Vallejo, City of*, 15 Cal. 638; *Towdy v. Ellis*, 22 Cal. 650; *Preston v. Central Cal. Water & Irr. Co.*, 11 Cal. App. 190, 197, 104 Pac. 462.

²⁴ *McGrath v. Valentine*, 93 C. C. A. 109, 167 Pac. 476.

²⁵ *Marsters v. Lash*, 61 Cal. 622. See, also, *post*, § 1063.

²⁶ *Hill v. Smith*, 27 Cal. 476; *Nunan v. San Francisco, City of*, 38 Cal. 689.

²⁷ *Harpham v. Haynes*, 30 Ill. 404; *Loosey v. Orser*, 17 N. Y. Super. Ct. Rep. (4 Bosw.) 391.

well as in form.²⁸ The failure of a defendant to deny the charges in a complaint, making out a prima facie case for the plaintiffs, will throw the onus on defendant in proving his affirmative allegations.²⁹ Where the answer fails to deny in such form as to put in issue any material allegations of the complaint, the plaintiff is entitled to judgment for the full amount.³⁰ An answer consisting of denials only is not amendable as of course.³¹

§ 1059. ——— GENERAL DENIALS — WHAT PROVABLE UNDER. Under the procedural code system of practice, a general denial is equivalent to the general issue.¹ But special matters of defense, as excuse or justification of an alleged trespass, a public or private right of way, or any interest in land short of property, or right of possession, must still be pleaded, and are not available under a general denial.² It puts the plaintiff upon proof of all the facts necessary to entitle him to recover, except as to the genuineness and due execution of note, etc.;³ and upon not merely every fact alleged, but also upon all implications and conclusions of law arising out of those facts.⁴ There is no such thing as the common-law general issue under the procedural codes,⁵ although the general denial is in most respects like it.⁶ Under Colorado prac-

²⁸ *Dimon v. Dunn*, 15 N. Y. 498.

²⁹ *Thompson v. Lee*, 8 Cal. 275.

³⁰ *Doll v. Good*, 38 Cal. 287, 290; *Dunham v. Travis*, 25 Utah 65, 75, 69 Pac. 468.

See *Kerr's Cyc. Cal. Code Civ. Proc.*, § 462.

³¹ *Plumb v. Whipples*, 7 How. Pr. (N. Y.) 411; *Farrand v. Hebeson*, 10 N. Y. Super. Ct. Rep. (3 Duer) 655.

¹ *White v. Moses*, 11 Cal. 69.

² *American Co. v. Bradford*, 27 Cal. 360, 367.

³ *Wand v. Packard*, 18 Cal. 391.

⁴ *Bellinger v. Craigie*, 31 Barb. (N. Y.) 534; *Academy of Music v. Hackett*, 2 Hilt. (N. Y.) 217; *Lord v. Cheseborough*, 6 N. Y. Super. Ct. Rep. (4 Sandf.) 696.

⁵ *Catlin v. Gunter*, 11 N. Y. 368, 62 Am. Dec. 113, 10 How. Pr. 315, affirming 8 N. Y. Super. Ct. Rep. (1 Duer) 253; *Troy v. Grimstead*, 10 Barb. (N. Y.) 321; *Stoddard v. Onondaga Annual Conference*, 12 Barb. (N. Y.) 573; *Houghton v. Townsend*, 8 How. Pr. (N. Y.) 441.

⁶ *Livingston v. Finkle*, 8 How. Pr. 486.

tice there is no general denial nor general issue, and each material allegation must be specifically traversed.⁷

Evidence admissible under general denial is generally held not to include any evidence of a distinctly affirmative defense,⁸ such as payment;⁹ overcharge of account, where fraud or mistake in an accounting is not set up,¹⁰ and the like. But in California, under the provisions of the procedural code, a general denial puts the allegation of the plaintiff in issue, and it is held that the defendant may prove payment, or that the plaintiff has transferred the demand to another person,¹¹ or any other fact which goes to show that no cause of action existed, or that the claim was void ab initio,¹²—but that the burden of the proof in

⁷ *Watson v. Lemen*, 9 Colo. 200, 11 Pac. 88.

⁸ *Terry v. Sickles*, 13 Cal. 427, 430.

Excuse or justification of an alleged trespass can not be shown under a general denial.—*American Co. v. Bradford*, 27 Cal. 360, 367; *Babcock v. Lamb*, 1 Cow. (N. Y.) 239; *Saunders v. Wilson*, 15 Wend. (N. Y.) 338.

⁹ *Walters v. Washington Ins. Co.*, 1 Iowa 404, 63 Am. Dec. 451; *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696; *Edson v. Dillaye*, 8 How. Pr. (N. Y.) 273.

¹⁰ *Terry v. Sickles*, 13 Cal. 427, 430; *Anzerias v. Naglee*, 74 Cal. 60, 75, 15 Pac. 371; *Hendy v. March*, 75 Cal. 566, 568, 17 Pac. 702; *Naylor v. Lewiston & S. E. Electric R. Co.*, 14 Idaho 789, 804, 96 Pac. 573; *Fleischner v. Kubli*, 20 Ore. 328, 338, 25 Pac. 1086.

¹¹ *Frisch v. Caler*, 21 Cal. 71; *Davanay v. Eggenhoff*, 43 Cal. 395; *Wetmore v. San Francisco, City of*, 44 Cal. 294, 300; *Farmers' & Merchants' Bank of Savings v. Christensen*, 51 Cal. 571, 573; *Bank*

of *Shasta v. Boyd*, 99 Cal. 604, 606, 34 Pac. 337; *Mendocino County v. Johnson*, 125 Cal. 337, 340, 58 Pac. 5; *Brooks v. Ardizzone*, 9 Cal. App. 216, 98 Pac. 300.

As to denial of ownership of negotiable instrument in action by immediate parties, see note 66 L. R. A. 513.

¹² See *Nelson v. Brodback*, 44 Mo. 596, 100 Am. Dec. 328; *Patton v. Fox*, 169 Mo. 97, 69 S. W. 287; *Tettley v. McElmurry*, 201 Mo. 382, 100 S. W. 37.

In ejectment, on general denial of plaintiff's title, evidence admissible to show title by adverse possession.—*Miller v. Beck*, 68 Mich. 76, 37 N. W. 899; *Ellis v. Murray*, 28 Miss. 129; *Lord v. Wilson*, 35 Mo. 490; *Little v. Reid*, 141 Mo. 242, 42 S. W. 674; *Hill v. Bailey*, 8 Mo. App. 85; *Sutton v. Clark*, 59 S. C. 440, 82 Am. St. Rep. 848, 38 S. E. 150.

—Statute of limitations may be shown under general denial.—*Hulsey v. Wood*, 55 Mo. 252; *Fuerkson v. Mitchell*, 82 Mo. 13; *Campbell v. Laclede Gaslight Co.*, 84 Mo.

such case is upon the defendant;¹³ and this rule has been followed in New Mexico,¹⁴ perhaps elsewhere. In actions of assumpsit the general rule is that any evidence which disaffirms the obligation of the contract at the time suit is commenced is admissible under the general issue;¹⁵ thus, evidence of any attendant circumstances tending to show that plaintiff has no cause of action against the defendant, is admissible under a general denial;¹⁶ so, also, can any evidence tending to reduce the amount of plaintiff's demand.¹⁷ If an answer, in response to an allegation of the complaint, instead of denying it in express terms, contains the averment that the defendant did not commit the act charged, or that the facts alleged to exist do not exist, these averments of the answer traverse the matters alleged, and are good denials of the same.¹⁸

352; *Fairbanks v. Long*, 91 Mo. 628, 4 S. W. 499; *Holmes v. Kring*, 93 Mo. 452, 6 S. W. 347; *Bird v. Sellers*, 113 Mo. 580, 21 S. W. 91; *Hill v. Bailey*, 8 Mo. App. 87; *Dunn v. Miller*, 8 Mo. App. 477.

Waiver may be shown under a general denial.—*Tuttley v. McElmurry*, 201 Mo. 382, 100 S. W. 37.

¹³ *Mendocino County v. Johnson*, 125 Cal. 337, 340, 58 Pac. 5.

¹⁴ *Cunningham v. Springer*, 13 N. M. 259, 285, 82 Pac. 232.

¹⁵ *Young v. Rummell*, 2 Hill (N. Y.) 478, 38 Am. Dec. 598; *Boyd v. Weeks*, 5 Hill (N. Y.) 393.

¹⁶ See: CAL.—*Bridges v. Paige*, 13 Cal. 640; *Hawkins v. Borland*, 14 Cal. 413, 415; *Foltz v. Cogswell*, 86 Cal. 242, 550, 551, 25 Pac. 60. GA.—*Jacobus v. Wood*, 84 Ga. 638, 640, 10 S. E. 1099. IND.—*Goble v. Dillon*, 86 Ind. 336, 44 Am. Rep. 315; *Gates v. Newman*, 18 Ind. App. 392, 409, 46 N. E. 654. N. Y.—*Miller v. Decker*, 40 Barb. 228; *MacDonnell v. Buffum*, 31 How.

Pr. 154; *Robinson v. Corn Exchange Fire & I. Nav. Ins. Co.*, 24 N. Y. Super. Ct. Rep. (1 Rob.) 14, 1 Abb. Pr. N. S. 186. N. D.—*Hogen v. Klabo*, 13 N. D. 319, 324, 100 N. W. 847, 849.

¹⁷ *Ridges v. Paige*, 13 Cal. 640, 641; *Foltz v. Cogswell*, 86 Cal. 542, 550, 551, 25 Pac. 60.

Attorney suing for services upon a quantum meruit, on general denial, defendant may offer evidence defeating the claim or reducing the amount claimed.—Id.

—"Unnecessary services rendered by the attorney can not be recovered for, and his failure to expend the few minutes necessary in the examination of the revised statutes and digest, the former of which contained a reference to and the latter the substance of a case which would have shown him the futility of the additional course pursued, amounted to negligence."—*Timberlake v. Crosby*, 81 Me. 249, 16 Atl. 896.

¹⁸ *Hill v. Smith*, 27 Cal. 479.

§ 1060. ——— SPECIFIC DENIALS—AS TO WHAT CONSTITUTE: SUFFICIENCY OF. It has already been pointed out that a denial, whether general or specific, simply puts in issue the allegations of the complaint; the difference between a general and a specific denial being only as to the extent to which, and the manner in which, the allegations of the complaint are traversed.¹ As to what constitutes a specific denial, it has been said, must depend largely upon the circumstances of each particular case, although there are a few general rules which have been asserted by courts and text-writers.² The manifest intention of the California procedural code is that the pleader, in a specific denial, shall point out the particular allegation denied. How well this is done must in all cases depend upon the legal acumen of the pleader and his skill in the use of the English language.³ The forms of denial, and their sufficiency generally, have already been discussed.⁴ The specific denial is governed, as to its sufficiency, by the rules already laid down.

Specific denial means,—under a procedural code or statute requiring that every material allegation of the complaint shall be denied, either by (1) a general, or (2) a specific denial,—a denial contradistinguished from (1) a general denial;⁵ (2) a denial according to or upon information and belief,⁶ or (3) a denial of sufficient information to form a belief;⁷ and means a specific denial of each and every allegation in the complaint which is controverted by the defendant, and each such denial is applicable to the specific allegation which it controverts, only.⁸

¹ See, ante, § 1058, footnote 14.

² See 1 Kinkad on Code Pleading, § 69.

³ Id.

⁴ See, ante, §§ 1056, 1058. See, also, post, §§ 1061-1063.

⁵ See, ante, § 1059.

⁶ Sands v. Maclay, 2 Mont. 35,

38; reversed upon another point, 94 U. S. 586, 24 L. Ed. 211.

As to denial upon information and belief, see, post, §§ 1064-1074

⁷ See, ante, § 1056.

⁸ San Francisco Gas Co. v. San Francisco, City of, 9 Cal. 453, 470; Seward v. Miller, 6 How. Pr. (N. Y.) 312.

An allegation can not be specifically controverted or denied by an answer without the latter mentioning, or designating by some particular mark of distinction, the allegation it is designed to controvert. It has been held that an answer denying in terms specifically every material allegation of a complaint, without particularizing the allegations controverted, is not a specific denial of any one of the allegations in the complaint, but is, in effect, a general denial, simply, and hence is insufficient, under the procedural codes, where a specific denial is called for on the part of the pleader.⁹

§ 1061. — KINDS OF DENIALS: AS TO MANNER OF PLEADING—IN GENERAL. Under the procedural code practice, as under the common-law practice, a specific denial of one or more allegations is held to be an admission of all others well pleaded.¹ It has also been held by our courts, that a specific denial to each allegation of a complaint is a separate denial applicable only to the specific allegation controverted,² as the object of the code in allowing the plaintiff to verify is to narrow the proof on the trial, and compel the defendant to deny specifically each separate allegation.³ And the defendant must either deny the facts alleged, or confess and avoid them.⁴ The rules of pleading under our system are intended to prevent evasion, and to require a denial of every specific averment in a sworn complaint, in substance and in spirit, and not merely a denial of its literal truth; and whenever the defendant fails to make such denial, he admits the averment.⁵

⁹ Seward v. Miller, 6 How. Pr. (N. Y.) 312.

¹ De Ro v. Cordes, 4 Cal. 117.

² San Francisco Gas Co. v. San Francisco, City of, 9 Cal. 453; Seward v. Miller, 6 How. Pr. (N. Y.) 312.

³ San Francisco Gas Co. v. San Francisco, City of, 9 Cal. 453.

⁴ Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692; Fish v. Redington, 31 Cal. 185.

⁵ Blankman v. Vallejo, City of, 15 Cal. 638; Castro v. Wetmore, 16 Cal. 380; Higgins v. Wortel, 18 Cal. 333; Morrill v. Morrill, 26 Cal. 292; Camden v. Mullen, 29 Cal. 564; Blood v. Light, 31 Cal.

Divided according to manner of pleading denials fall into three general classes: (1) Those pleaded according to the established usage and rules of pleading, and are unobjectionable; (2) conjunctive denials,⁶ and (3) literal denials,⁷ or denials in the language of the complaint; although conjunctive denials may be, and sometimes are, in the language of the complaint.

§ 1062. ——— CONJUNCTIVE DENIALS — NEGATIVE PREGNANT. Conjunctive denials are generally condemned by the courts. That is, if several material facts are stated conjunctively in a verified complaint, an answer which undertakes to deny these averments as a whole, conjunctively stated, is evasive, and an admission of the allegations attempted to be denied.¹ Such a manner of pleading a denial is violative, alike, of the principles of common-law pleading, and of the express direction of our procedural codes. Thus, an answer to a verified complaint should contain a specific denial to each allegation of the complaint controverted, or a denial thereof according to the defendant's information and belief. The denial should be in the disjunctive, although the allegations of the complaint are stated in the conjunctive.² If an

215; Toland v. Mandell, 38 Cal. 30; Doll v. Good, 38 Cal. 287.

See, also, discussion and authorities, ante, § 1056.

⁶ As to conjunctive denials, see, post, § 1062.

⁷ As to literal denials, see, post, § 1063.

¹ Hensley v. Tartar, 14 Cal. 508; Fitch v. Bunch, 30 Cal. 208; Blood v. Light, 31 Cal. 115; Fish v. Redington, 31 Cal. 185, 195; Reed v. Calderwood, 32 Cal. 109; Doll v. Good, 38 Cal. 287; Duckworth v. Watsonville Water & Light Co., 150 Cal. 520, 530, 89 Pac. 338; Blodgett v. Scott, 11 Cal. App. 310, 104 Pac. 842; Bartlett Estate Co.

v. Frasee, 11 Cal. App. 373, 375, 105 Pac. 130; Scovill v. Barney, 4 Ore. 288, 290.

² Halsey v. Tartar, 14 Cal. 508; Kuhland v. Sedgwick, 17 Cal. 123; Brown v. Scott, 25 Cal. 195; Fish v. Redington, 31 Cal. 185, 194; Burke v. Carruthers, 31 Cal. 467; Reed v. Calderwood, 32 Cal. 109; Wise v. Rose, 110 Cal. 159, 42 Pac. 569; King v. Ray, 11 Cal. Ch. (N. Y.) 235; Shearman v. New York Central Mills, 1 Abb. Pr. (N. Y.) 187; Beach v. Barons, 13 Barb. (N. Y.) 305; Baker v. Bailey, 16 Barb. (N. Y.) 54; Elton v. Markham, 20 Barb. (N. Y.) 343; Salinger v. Lusk, 7 How. Pr.

allegation of a complaint consists of several clauses or propositions connected by the copulative conjunction "and," a denial of the entire allegation is evasive and insufficient. Each proposition should be separately denied.³ Where several allegations of a complaint are not connected by the conjunction "and," a denial in the answer of these allegations conjunctively does not amount to a denial of the allegations to which the defendant professes to respond.⁴

Negative pregnant is a vice usually adhering in conjunctive denials; and when present, the denial goes to the form and not to the substance and spirit of the allegation in the complaint, and is insufficient.⁵ Under peculiar provisions of local statutes, a modification of the general doctrine is found in some cases from Iowa,⁶ Missouri,⁷ and one case from New York.⁸

(N. Y.) 430; *Otis v. Ross*, 8 How. Pr. (N. Y.) 193, 11 N. Y. Leg. Obs. 343; *Davison v. Powell*, 16 How. Pr. (N. Y.) 467; *Blake v. Elred*, 18 How. Pr. (N. Y.) 240; *Young v. Catlett*, 13 N. Y. Super. Ct. Rep. (6 Duer) 443; *Livingston v. Hammer*, 20 N. Y. Super. Ct. Rep. (7 Bosw.) 670.

Doctrine qualified, it seems, in *Wall v. Buffalo Water Works*, 18 N. Y. 119.

³ *More v. Del Valle*, 28 Cal. 170; *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144; *Westbay v. Gray*, 116 Cal. 660, 663, 48 Pac. 800.

⁴ *Fitch v. Bunch*, 30 Cal. 208; *Leroux v. Murdock*, 51 Cal. 541; *Duckworth v. Watsonville Water & Light Co.*, 150 Cal. 530, 89 Pac. 343.

⁵ See: CAL.—*Blankman v. Valjejo*, City of, 15 Cal. 639; *Kuhland*

v. Sedgwick, 17 Cal. 123; *Caulfield v. Saunders*, 17 Cal. 569; *Woodworth v. Crouse*, 46 Cal. 287; *Kenney v. Maryland Casualty Co.*, 15 Cal. App. 571, 573, 115 Pac. 456. KAN.—*Miller v. Brumbaugh*, 7 Kan. 343. N. Y.—*Seward v. Miller*, 6 How. Pr. 312; *Young v. Catlett*, 13 N. Y. Super. Ct. Rep. (6 Duer) 437. S. D.—*Webster Independent School Dist. Board v. Prior*, 11 S. D. 292, 293, 77 N. W. 106. UTAH—*Rock Springs Coal Co. v. Salt Lake Sanitarium Assoc.*, 7 Utah 158, 162, 25 Pac. 742. WIS.—*Robbins v. Lincoln*, 12 Wis. 9.

As to negative pregnant, see, ante, § 735; post, § 1063.

⁶ *Mahana v. Blunt*, 20 Iowa 142; *Doolittle v. Greene*, 32 Iowa 123.

⁷ *Bank v. Hogan*, 47 Mo. 472; *Ells v. Pacific R. Co.*, 55 Mo. 278.

⁸ *Wall v. Buffalo Water Works Co.*, 18 N. Y. 119.

§ 1063. ——— LITERAL DENIALS, OR DENIALS IN LANGUAGE OF COMPLAINT—NEGATIVE PREGNANT. Literal denials, following the exact language of the complaint, are not sufficient. Thus, where the answer denied the allegations of indebtedness as to the time, amount, and work, in the very words of the complaint, it was held that the answer raised an immaterial issue upon these particulars.¹ So where the form of the allegation was that defendant “unlawfully and wrongfully seized and took said property into his possession from said plaintiff,” and defendant denied “that he (defendant) wrongfully and unlawfully seized, took or carried away the said property,” it was held that the fact defendant took the property from the plaintiff was not denied but admitted.² An averment in the complaint that the act was “wrongfully and maliciously done,” a denial in the answer that it was “wrongfully and maliciously done,” does not put in issue the doing of the act.³ But an allegation in a complaint that the assignment which the plaintiff seeks to set aside was made with intent to hinder, delay, and defraud creditors, etc., is sufficiently put in issue by a denial that the assignment was made with intent to hinder and defraud creditors.⁴ An allegation in a sworn answer that “on a certain day the said French and Robinson, by deed duly executed, acknowledged, and recorded, conveyed said premises to this defendant, for the sum of seven thousand seven hundred and fifty dollars,” is not denied by a statement in the replication that “the plaintiffs further deny that said French and Robinson, or either of them, conveyed said premises to the defendant for the sum of seven thousand seven hundred and fifty dollars, or for any other sum.” Such denial does not deny the conveyance, the

¹ *Caulfield v. Sanders*, 17 Cal. 569; *Republican Pub. Co. v. Mosman*, 15 Colo. 399, 24 Pac. 1051.

² *Woodworth v. Knowlton*, 22 Cal. 164; *Richardson v. Smith*, 29 Cal. 531.

³ *Kinsey v. Wallace*, 36 Cal. 463.

⁴ *Read v. Worthington*, 22 N. Y. Super. Ct. Rep. (9 Bosw.) 617.

material fact, but only a conveyance for a consideration. Under such denial, the party making such averment is not required to offer his deed in evidence on the trial. The allegation of the answer is deemed admitted under the provisions of the statute.⁵

Negative pregnant is raised by the denial in the answer of the allegations in the complaint in the exact language of the complaint, negating the same by prefixing or suffixing thereto a denying clause; is no denial at all, and raises no issue, but is often held to be an admission of the alleged facts, or that they may have transpired on some other date, or under different circumstances, than set out in the complaint.⁶ Thus, such a denial of the exact value alleged in the complaint is an admission of any less value,⁷ or a denial of injury in the sum named is an admission of damages in any less sum;⁸ denial that all the material contracted for the erection of a building

⁵ *Landers v. Bolton*, 26 Cal. 416.

⁶ See, among other cases: CAL.—*Burke v. Table Mountain Water Co.*, 12 Cal. 403, 407; *Woodworth v. Knowlton*, 22 Cal. 164; *Morrill v. Morrill*, 26 Cal. 292; *Landers v. Bolton*, 26 Cal. 418; *Randolph v. Harris*, 28 Cal. 567, 87 Am. Dec. 142; *Leffingwell v. Griffing*, 31 Cal. 233, 238; *Bradbury v. Cronise*, 46 Cal. 287; *Larney v. Mooney*, 50 Cal. 610, 611; *Westbay v. Gray*, 116 Cal. 663, 48 Pac. 800. IDAHO—*Welch v. Bigger*, 24 Idaho 169, 133 Pac. 381. IND.—*Goble v. Dillon*, 86 Ind. 331, 44 Am. Rep. 308. KAN.—*Miller v. Brumbaugh*, 7 Kan. 343. MONT.—*Power v. Gum*, 6 Mont. 5, 9, 9 Pac. 575; *Stewart v. Budd*, 7 Mont. 573, 578, 19 Pac. 221. N. Y.—*Seward v. Miller*, 6 How. Pr. 312; *Lawrence v. Cabot*, 41 N. Y. Super. Ct. Rep. (9 Jones & S.) 122. OHIO—*Caldwell v. Caldwell*,

45 Ohio St. 512, 520, 15 N. E. 297. ORE.—*Scoville v. Barney*, 4 Ore. 288; *Moser v. Jenkins*, 5 Ore. 448; *Randall v. Simmons*, 40 Ore. 557, 67 Pac. 515. S. D.—*Webster Independent School Dist. Board v. Prior*, 11 S. D. 292, 77 N. W. 106. UTAH—*Rock Spring Coal Co. v. Salt Lake Sanitarium Assoc.*, 7 Utah, 158, 25 Pac. 742. WASH.—*Dillon v. Spokane County*, 3 Wash. Tr. 498, 17 Pac. 889. WIS.—*Argard v. Parker*, 81 Wis. 581, 51 N. W. 1012. FED.—*Miller v. Tobin*, 9 Sawy. 401, 18 Fed. 614.

⁷ *Ronning v. Way*, 18 Cal. App. 527, 123 Pac. 615; *Caldwell v. Caldwell*, 45 Ohio St. 512, 15 N. E. 297; *Scovill v. Barney*, 4 Ore. 288; *Rock Spring Coal Co. v. Salt Lake Sanitarium Assoc.*, 7 Utah 158, 25 Pac. 743.

⁸ *Welch v. Bigger*, 24 Idaho 169, 133 Pac. 381.

was delivered is an admission that substantially all was delivered,⁹ and a denial that the material was contracted for at a named price, which was the reasonable value thereof, an answer framed as a negative pregnant admits the value as stated;¹⁰ denial of payment made on date named in complaint is admission that payment was made on some other date,¹¹ and a denial "that the whole of said sum and interest has not been paid" is an admission that any amount less than the whole has not been paid;¹² a denial "that each and every" of four separate causes of action set forth in the complaint "did accrue within six years," contains a negative pregnant and is bad;¹³ denial in the language of the complaint that the defendant carelessly, negligently and wantonly ran over and killed plaintiff's stock, does not constitute a denial of the injury complained of;¹⁴ denial that defendant unlawfully entered upon premises and closed a window, is an admission that he closed the window therein.¹⁵ In an action of replevin to recover possession of a city warrant which the plaintiff alleges came into its hands by indorsement, an answer alleging "that whether said warrant came into the hands of the plaintiff as alleged, this defendant has no knowledge or information sufficient to form a belief, and he, therefore, denies the same," is an insufficient denial, for the reason that it constitutes a negative pregnant.¹⁶

⁹ *Jones & Laughlin Steel Co. v. Abner Doble Co.*, 162 Cal. 497, 123 Pac. 290.

¹⁰ *Blank v. Commonwealth Amusement Corp.*, 19 Cal. App. 720, 127 Pac. 805.

¹¹ *Schaetzel v. Germantown Farmers' Mut. Ins. Co.*, 22 Wis. 412; *Argard v. Parker*, 81 Wis. 581, 51 N. W. 1012.

¹² *Westbay v. Gray*, 116 Cal. 660, 663, 48 Pac. 800.

¹ Code Pl. and Pr.—89

¹³ *Gammon v. Dyke*, 2 Wash. Tr. 266, 5 Pac. 845.

¹⁴ *Harden v. Atchison & N. R. Co.*, 4 Neb. 521.

¹⁵ *Larney v. Mooney*, 50 Cal. 610.

¹⁶ *National Bank v. Meerwaldt*, 8 Wash. 630, 36 Pac. 763. See *Collins v. North Side Pub. Co.*, 1 Misc. (N. Y.) 211, 20 N. Y. Supp. 892; affirmed, 3 Misc. (N. Y.) 635, 22 N. Y. Supp. 1132.

§ 1064. — ON INFORMATION AND BELIEF—IN GENERAL. Under the California procedural code and other codes requiring all the material allegations in a complaint shall be denied (1) generally, (2) specifically, or (3) according to, or upon, information and belief, a denial is none the less a specific denial because made upon information and belief,¹ where it is phrased in the proper form,² in those cases in which the subject-matter of the allegations in the complaint is not necessarily, or presumptively, within the knowledge of the defendant.³ Thus, the general rule is that, in an action on a promissory note or other negotiable instrument, the defendant may deny, on information and belief, that the instrument sued on was duly indorsed, delivered and transferred to the plaintiff,⁴ in those cases in which the defendant has not had due personal notice of such transfer, or that notice is not imparted by a public record.⁵ But here, also, the denial must be phrased in the proper form to constitute a denial of the allegations in the complaint, and not merely a denial of knowledge on the part of the defendant.⁶ Thus, an answer to a verified complaint declaring on a promissory note, an answer alleging “that, as to whether the payee in said note transferred the same by indorsement, or whether plaintiff is or ever has been the owner or holder of said note, defendant has no knowl-

¹ *Maclay v. Sands*, 94 U. S. 586, 24 L. Ed. 211, reversing 2 Mont. 35. See *Ditteman v. Cable Milling Co.*, 16 Idaho 298, 133 Am. St. Rep. 98, 101 Pac. 593; *Golden v. Spokane & E. I. R. Co.*, 20 Idaho 535, 118 Pac. 1077; *Lewis v. Weyerhorst*, 16 Mont. 269, 40 Pac. 589; *Bennett v. Leeds Mfg. Co.*, 110 N. Y. 150, 153, 14 N. Y. Civ. Proc. Rep. 443, 17 N. E. 669.

As to when defendant may deny on information and belief, see notes 70 Am. Dec. 625; 133 Am.

St. Rep. 105, 55 L. R. A. 513, 31 L. R. A. (N. S.) 771.

² As to form of denial, see, post, §§ 1067-1069.

³ See, post, § 1070; *Lewis v. Weyerhorst*, 16 Mont. 267, 269, 40 Pac. 589.

⁴ See note and authorities 55 L. R. A. 545.

⁵ *McClure v. Bigstaff*, 18 Ky. L. Rep. 601, 37 S. W. 294, 38 S. W. 431.

⁶ As to form of denial, see, post, § 1067-1069.

edge or information sufficient to form a belief, and therefore denies the same," is insufficient, under some of the procedural codes,⁷ because it is not a denial according to, or upon, information and belief of the allegations in the complaint, as the statute requires, but merely a denial of the defendant's knowledge, which never meets the requirements of some of the procedural codes. It is to be noted, however, that a defendant is not permitted to deny upon information and belief, even in the proper form as to phraseology, that the plaintiff is the owner and holder of the negotiable instrument sued on; such an answer being held to be frivolous, insufficient, and no denial.⁸

*Statement why denial on information and belief is frequently made, giving the reasons therefor; and where the subject-matter is presumptively within the knowledge of the defendant, the reasons why defendant has not the requisite knowledge to plead a specific denial on knowledge or on information and belief, must be satisfactory, or the plea will be insufficient.*⁹ The practice of accompanying a denial on information and belief with a statement, setting forth the reason for thus denying, has been approved by the courts.¹⁰ A person may have sufficient information satisfying him of the falsity of the allegations in a complaint, and yet not have such positive knowledge as to warrant him in a specific denial on knowledge, and to deny the right to answer on such information would, in many cases, lead to injustice.¹¹ But

⁷ *Rossiter v. Loeber*, 18 Mont. 372, 385, 45 Pac. 560.

Under California code, probably sufficient, if otherwise unobjectionable.

⁸ See note and authorities 55 L. R. A. 549.

⁹ See, post, § 1070, footnotes 4 et seq.

¹⁰ *Raymond v. Wimsette*, 12 Mont. 551, 31 Pac. 537; *Bennett v.*

Leeds Mfg. Co., 110 N. Y. 150, 14 N. Y. Civ. Proc. Rep. 443, 17 N. E. 669; *State ex rel. Treadwell v. Hancock County Commrs.*, 11 Ohio St. 183; *Roberts v. Glenn*, 4 Ohio Dec. 121; *McKenzie v. Washington Ins. Co.*, 2 Desn. 223, 13 Ohio Dec. 137.

¹¹ *Jones v. Petaluma, City of*, 36 Cal. 320; *Bennett v. Leeds Mfg. Co.*, 110 N. Y. 150, 14 N. Y. Civ. Proc. Rep., 443, 17 N. E. 669;

the rule allowing a denial in accordance with, or upon, information and belief must not be permitted to be abused to the extent of allowing a declared want of knowledge to become a subterfuge for the evasion of the requirements of the statute as to denials and verifications.¹²

Denial on information and belief in injunction case, is not such a denial as will furnish a basis for a motion for the dissolution of a temporary restraining order, on the ground that the equities in the complaint are fully denied by the answer.¹³ Such a denial affords no presumption against the plaintiff's claim; it merely establishes the fact that the defendant has no personal knowledge to aid it or to disprove it;¹⁴ it merely puts the plaintiff on the proof of his allegations, and is in no sense an answer thereto.

§ 1065. ——— As to "BELIEF." The word "belief," as used in the phrase "information and belief," is contradistinguished from "knowledge"¹ and "presumption,"² and is different from, being superior to, mere

Brotherton v. Downey, 21 Hun (N. Y.) 436, 59 How. Pr. 206.

¹² See Bliss on Code Pleading, § 326.

¹³ Porter v. Jennings, 89 Cal. 440, 26 Pac. 965; Chace v. Jennings, 3 Cal. Unrep. 474, 28 Pac. 681; Dingley v. Buckner, 11 Cal. App. 187, 104 Pac. 480; Collins v. Stanley, 15 Wyo. 295, 123 Am. St. Rep. 1022, 88 Pac. 622.

Compare: Long v. Newman, 10 Cal. App. 439, 102 Pac. 538.

¹⁴ Poor v. Carleton, 3 Sumn. 70, 77, 78, Fed. Cas. No. 11272.

¹ See Burgess v. Martin, 111 Ala. 656, 20 So. 506; Humphreys v. McCall, 9 Cal. 59, 70 Am. Dec. 621; Ohio Valley Coffin Co. v. Goble, 28 Ind. App. 362, 62 N. E. 1025; Hatch v. Carpenter, 75 Mass. (9 Gray)

271, 274; Iron Silver Min. Co. v. Reynolds, 124 U. S. 374, 34 L. Ed. 466, 8 Sup. Ct. Rep. 598.

Solid distinction lacking, either practical or metaphysical, between "belief" and "knowledge"; the difference between them being simply in the degree of conviction on the evidence of the fact. "Belief" is the conclusion of the mind as to the existence or nonexistence of a thing or fact, and may be either weak or strong; a strong and decided conviction as to the same matter is classed as "knowledge" although, in the ultimate analysis, it is merely the "belief" of the individual.—State v. Berkeley, 41 W. Va. 455, 23 S. E. 608.

² Worley's Adm'x v. High's Adm'r, 40 Ala. 171, 177.

“suspicion” or “supposition,”³ but does not attain to personal information in any form,⁴ and does not reach the dignity of a fully-fledged “opinion,”—although the philological distinction between “belief” and “opinion” is too subtle and refined to form a basis on which to found sufficient justice;⁵ it is merely an assent of the mind to the truth of a declaration, proposition, or alleged facts;⁶ a persuasion,⁷ or a conclusion drawn from information or known facts.⁸ In other words, “belief” is to be taken in its ordinary and popular sense, having no technical or recondite significance attached to it, and means the actual conclusion, or impression upon which action or declaration is assumed to be justified, of a person from information he considers reliable and trustworthy, but regarding which he has no personal experience or knowledge; is used in connection with a denial of the allegations in a complaint in the same sense that it is used in connection with a verification to a pleading,⁹ and admits of all degrees of “belief,” from the slightest suspicion to the fullest assurance.¹⁰

In California, it was declared in an early case,—and this rule has ever since been followed in that state—that, as used in a statute requiring an answer in an action, in cases in which the complaint is verified, to contain a specific denial of all the allegations in the complaint which are controverted by the defendant, or a denial thereof “according to information and belief,” the word “belief” means an actual conclusion of the defendant, or other party qualifying to make the verification, drawn from

³ *Gosser v. Gosser*, 183 Pa. St. 490, 38 Atl. 1014.

⁴ *First Nat. Bank v. Gregg*, 79 Pa. St. 384, 387.

⁵ *Day v. Southwell*, 3 Wis. 657, 661.

⁶ *Keller v. State*, 102 Ga. 506, 514, 31 S. E. 92, 95; *Grube v. Wells*, 34 Iowa 148, 151.

⁷ *Keller v. State*, 102 Ga. 506, 514, 31 S. E. 92, 95.

⁸ *Ventress v. Smith*, 35 U. S. (10 Pet.) 161, 171, 9 L. Ed. 382.

⁹ As to verification on information and belief, see, ante, § 796.

¹⁰ *State v. Harris*, 97 Iowa 407, 409, 66 N. W. 728.

information other than personal knowledge; declaring that there is a clear distinction between “knowledge” and mere “belief,” and that knowledge and belief can not exist together; that such belief may be founded on the declaration or statement of another, who is not a competent witness, and not under oath, and which declaration or statement is therefore not legal testimony.¹¹ If the party has formed a belief from this source, he must state it; he can not be the judge as to whether his information is legal testimony.¹² If the defendant is presumed to have knowledge of the matters alleged in the complaint, he must, by a proper statement of facts and circumstances, overcome the presumption of knowledge on his part, which being done, his answer on information and belief would be deemed all the law requires.¹³

Where the alleged fact is, from its nature, presumptively within the personal knowledge of the defendant, he can not answer on information and belief.¹⁴

§ 1066. ——— As to “INFORMATION.” The word “information,” as used in a statute permitting and regulating denials of the allegations in a complaint upon, or according to, “information and belief,” like the word “belief,”¹ is distinguished from “knowledge,”² is used in its ordinary and popular significance does not mean legal evidence,³ and imports anything inducing legal or logical and honest “belief” in any of its degrees;⁴ but does not include “hallucination” in any of the varied forms, which is merely a blunder, an error, a fallacy, a

¹¹ *Humphreys v. McCall*, 9 Cal, 59, 62, 70 Am. Dec. 621, 622.

¹² *Id.*

¹³ *Brown v. Scott*, 25 Cal. 194; *Vassault v. Austin*, 32 Cal. 606.

¹⁴ As to matters presumptively within knowledge of defendant, see, post, § 1070.

¹ As to “belief” and the use of the term in its ordinary and popular significance, see, ante, § 1065.

² *Downing North Denver Land Co. v. Burns*, 30 Colo. 283, 70 Pac. 413.

³ *Humphreys v. McCall*, 9 Cal. 59, 62, 70 Am. Dec. 621, 622.

⁴ See, ante, § 828, footnote 7.

mistake of one or more of the senses or faculties of the mind—a delusion.⁵

§ 1067. ——— AS TO FORM OF DENIAL. A defendant who has not the personal knowledge requisite to enable him to specifically deny all the material allegations in the complaint controverted by him, but seeks to do so on “information and belief,” must strictly pursue the language of the statute of the jurisdiction, and the denial must be “according to” or “upon” his information and belief, according as the statute is worded. Yet in those cases where the denial is “upon his information and belief,” instead of the statutory language, “according to his information and belief,” while it may well be doubted whether the former mode of denial does not allow a little wider field for evasion, it has been widely adopted by pleaders, and there are cases which hold that it is sufficient,¹ while there are other cases holding what is thought to be the better rule, that the denial must be positively made out in the statutory language.² The careful pleader, at all events, will follow the statutory language, there is no occasion or justification for departing from it. A mere allegation of ignorance of the facts alleged will be insufficient to raise an issue, or put the plaintiff to his proof, under some statutes, and the facts so attempted to be controverted will be held admitted.³

⁵ See *Staples v. Wellington*, 58 Me. 453, 459; *People v. Krist*, 168 N. Y. 19, 666, 15 N. Y. Cr. Rep. 532, 60 N. E. 1057, 61 N. E. 1132; *Foster's Ex'rs v. Dickerson*, 64 Vt. 233, 24 Atl. 253; *McNett v. Cooper*, 13 Fed. 586, 590.

¹ See *Vassault v. Austin*, 32 Cal. 606; *Roussin v. Stewart*, 33 Cal. 211; *Jones v. Petaluma, City of*, 36 Cal. 230; *Kirstein v. Madden*, 38 Cal. 158; *First Nat. Bank v. Slatery*, 4 App. Dec. (N. Y.) 421, 38 N. Y. Supp. 859.

² See *State ex rel. Milsted v. Butte City Water Co.*, 18 Mont. 199, 56 Am. St. Rep. 574, 32 L. R. A. 697, 44 Pac. 966.

³ *Hill v. Smith*, 27 Cal. 476; *Milwaukee Gold Extraction Co. v. Gordon*, 37 Mont. 209, 215, 95 Pac. 995; *Wood v. Stanleys*, 3 N. Y. Code Rep. 152; *Sayre v. Cushing*, 7 Abb. Pr. (N. Y.) 371; *Elton v. Markham*, 20 Barb. (N. Y.) 343.

As to when denial on information and belief is permissible, see, ante, § 1064, and references to an-

Under the former practice in California the defendant was not allowed to deny for want of information or belief, but now he may.⁴ The denial, though on information and belief, must be made positively and “according to” or “upon” his information and belief;⁵ any other form of denial is not a denial of the allegations in the complaint, but merely a denial of knowledge on the part of the defendant, and not sufficient,⁶ under most of the procedural codes. The duty of acquiring the requisite knowledge or information is imposed by statute on the defendant, to enable him to answer in the proper form.⁷ Thus, the defendant can not allege that “he has not sufficient knowledge or information to form a belief, and therefore denies,” or say that he “denies for want of information to enable him to admit,⁸” because it is his duty to inform himself as to the facts.⁹ It is not necessary to add, “and therefore denies,”¹⁰ unless it be acts of the defendant which are charged in the complaint.¹¹ A denial alleging that defendant “has no knowledge or

notated cases at end of footnote 1; also, *Lewis v. Acker*, 11 How. Pr. (N. Y.) 163; *Nicoll v. Haas*, 5 App. Div. (N. Y.) 206, 39 N. Y. Supp. 205; *Rosentell v. Van Cott*, 5 App. Div. (N. Y.) 128, 39 N. Y. Supp. 53.

⁴ See, ante, §§ 1056, 1064.

⁵ *State ex rel. Milsted v. Butte City Water Co.*, 18 Mont. 199, 56 Am. St. Rep. 574, 44 Pac. 966.

⁶ *State ex rel. Milsted v. Butte City Water Co.*, 18 Mont. 199, 56 Am. St. Rep. 574, 32 L. R. A. 697, 44 Pac. 966; *Rossiter v. Loeber*, 18 Mont. 373, 45 Pac. 560; *Cumins v. Lawrence County*, 1 S. D. 158, 46 N. W. 182; affirmed, 2 S. D. 452, 50 N. W. 900.

But see next section, and authorities.

⁷ *San Francisco Gas Co. v. San*

Francisco, City of, 9 Cal. 453; *Fish v. Redington*, 31 Cal. 185; *Hance v. Rumming*, 1 N. Y. Code Rep. (N. S.) 204, 2 E. D. Smith 48; *Mott v. Burnett*, 2 E. D. Smith 50, modifying 1 N. Y. Code Rep. (N. S.) 225.

⁸ See authorities footnote 6, this section; also, *Bliss on Code Pleading*, § 326; *Pomeroy on Code Remedies and Remedial Rights*, § 640.

⁹ See authorities in footnote 7, this section.

¹⁰ See *Sackett v. Havens*, 7 Abb. Pr. (N. Y.) 371, note; *Flood v. Reynolds*, 13 How. Pr. (N. Y.) 112; *Morris v. Parker*, 3 Johns. Ch. (N. Y.) 297.

¹¹ *Sloan v. Little*, 3 Pal. Ch. (N. Y.) 103.

Compare: *Kerr's Cyc. Cal. Code Civ. Proc.*, § 437.

information of certain facts except from certain documents," is insufficient, if they are not set forth and not answered according to belief.¹²

One defendant can not deny knowledge, etc., on the part of another defendant, in those cases in which the answer is verified. The denial, therefore, should in general, be made severally.¹³ In cases in which a copy of an instrument in writing is annexed to the petition as part thereof, the correctness of the copy can not be regarded as the material allegations in the petition; but the petition is to be regarded as alleging the substantial effect of the instrument, which is shown by the copy; and the answer must meet the allegations, as required by statute, the same as though such was the form of the petition.¹⁴

§ 1068. ——— RULE IN CALIFORNIA, NEW YORK AND OHIO. Because of the peculiar provisions of the procedural codes in California,¹ New York,² Ohio,³ and perhaps elsewhere, a rule different from that set out in the preceding section prevails, and a denial based on the want of information sufficient to form a belief, is held to be sufficient. Mr. Justice Maxwell lays this down as the general rule,⁴ citing a single Ohio case,⁵ but not referring to the line of cases set forth in the preceding section. The Ohio case, as above noted, is ruled by the provision of the statute in that state, and is not a pre-

¹² Cuyler v. Bogert, 3 Pal. Ch. (N. Y.) 186.

¹³ Kinkaid v. Klipp, 8 N. Y. Super. Ct. Rep. (1 Duer) 692, 11 N. Y. Leg. Obs. 313.

¹⁴ Bentley v. Dorcas, 11 Ohio St. 398.

¹ Kerr's Cyc. Cal. Code Civ. Proc., § 437.

² New York Code Civ. Proc.,

§ 500; Rochkind v. Perlman, 123 App. Div. (N. Y.) 808, 108 N. Y. Supp. 224, 1151.

³ State ex rel. Treadwell v. Hancock County Commrs., 11 Ohio St. 183.

⁴ Maxwell on Code Pleading, p. 386.

⁵ State ex rel. Treadwell v. Hancock County Commrs., 11 Ohio St.

183.

cedent in any jurisdiction not having the same peculiar statutory provision.

No express distinction made by the courts themselves, it has been said,⁶ between (1) a denial according to or upon information and belief, and (2) a denial because of a want of information sufficient to form a belief. This distinction, it is to be noted, is one that is made by the statutory provisions, and not by the court decisions.

§ 1069. — — — — — ILLUSTRATIONS OF INSUFFICIENT FORMS OF DENIAL. We have already seen that, under the California practice, a denial of knowledge merely is not sufficient.¹ An allegation that defendant “does not know of his information or otherwise;”² or that defendant “is not informed, and can not state;”³ or “that defendant has no knowledge,” or “that defendant is ignorant whether,” or “that defendant has not sufficient knowledge or information whereon to found a belief,” or “that defendant does not know or believe,” are not sufficient denials.⁴ Nor that he has no “recollection concerning it;”⁵ nor “that he is ignorant of whether,” etc.⁶ But in case he admits his belief, he need not deny information.⁷ So, where he has the means of informing himself, such a denial would be insufficient.⁸ But in other cases such a denial is sufficient in New York.⁹ A denial of any knowledge or information that the copy of the instrument set out in the complaint was correct, after admitting

⁶ 30 L. R. A. (N. S.) 771.

¹ See, ante, § 1067.

² Sayre v. Cushing, 7 Abb. Pr. (N. Y.) 371.

³ Elton v. Markham, 20 Barb. (N. Y.) 343, 348.

⁴ Mott v. Burnett, 1 N. Y. Code Rep. (N. S.) 225; approved but judgment modified in 2 E. D. Smith 50; Robinson v. Woodgate, 3 Edw. Ch. (N. Y.) 422.

⁵ Nichols v. Jones, 6 How. Pr. (N. Y.) 355.

⁶ Wood v. Stanfords, 3 N. Y. Code Rep. 152.

⁷ Davis v. Mapes, 2 Pal. Ch. (N. Y.) 105.

⁸ Hance v. Rumming, 2 E. D. Smith (N. Y.) 48, 1 N. Y. Code Rep. (N. S.) 204.

⁹ Dovan v. Dinsmore, 33 Barb. (N. Y.) 86, 29 How. Pr. 503; Brown v. Ryckman, 12 How. Pr. (N. Y.) 313.

that an instrument of that character had been executed by defendant, is a frivolous denial;¹⁰ or that judgment was obtained against defendant;¹¹ or of a note made by partner;¹² or that the note was transferred by defendant;¹³ or whether plaintiff is owner and holder of a note indorsed and delivered by defendant.¹⁴ An answer which denies that the defendant has any knowledge of the facts charged, without adding that he has no information or belief of them, is defective.¹⁵ The allegation of death of plaintiff's ancestor in a verified complaint is not sufficiently controverted by the averment in the answer "that defendant has not sufficient knowledge to form a belief," and, therefore, neither admits nor denies.¹⁶ The allegation must be positive that he has no information or belief sufficient to enable him to answer.¹⁷ An answer placing a denial of an averment of the complaint, on the ground of want of information sufficient to enable the defendants to answer the same, without also averring that they have no belief on the subject sufficient to enable such answer, is insufficient to raise an issue.¹⁸ If the

¹⁰ *Wesson v. Judd*, 1 Abb. Pr. (N. Y.) 254.

See, however, *Kellogg v. Baker*, 15 Abb. Pr. (N. Y.) 286; *Goodell v. Blumer*, 41 Wis. 436.

See discussion and authorities, post, § 1070.

¹¹ *Ketcham v. Zerega*, 1 E. D. Smith (N. Y.) 555; *Elmore v. Hill*, 46 Wis. 618, 1 N. W. 235.

¹² *Mott v. Burnett*, 1 N. Y. Code Rep. (N. S.) 225; approved but judgment modified in 2 E. D. Smith 50.

¹³ *Fales v. Hicks*, 12 How. Pr. (N. Y.) 153.

¹⁴ *Kamlah v. Salter*, 1 Hilt. (N. Y.) 558, 6 Abb. Pr. 226.

Compare: *Genesee Mut. Ins. Co. v. Moynihan*, 5 How. Pr. (N. Y.)

321; *Snyder v. White*, 6 How. Pr. (N. Y.) 321; *Temple v. Murray*, 6 How. Pr. (N. Y.) 329.

¹⁵ *Bradford v. Geiss*, 4 Wash. C. C. 513, Fed. Cas. No. 1768.

¹⁶ *Anderson v. Parker*, 6 Cal. 197, 200.

Hearsay information, derived from the immediate family of the deceased, is sufficient to establish, prima facie, the fact of death.—*Anderson v. Parker*, 6 Cal. 197, 200; *Fearnley v. Fearnley*, 44 Colo. 427, 98 Pac. 823; *Du Pont v. Davis*, 30 Wis. 178.

See, also, note 91 Am. Dec. 528.

¹⁷ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 437.

¹⁸ *Naftzger v. Gregg*, 99 Cal. 83, 87, 37 Am. St. Rep. 23, 33 Pac. 757.

defendant admits that he executed an instrument upon which he is sued, he can not deny information sufficient to form a belief as to the facts recited in the instrument, or that the instrument is correctly stated in the complaint. He is entitled to an inspection of the original, to enable him to answer.¹⁹ But a party is not presumed to recollect the date or contents of a written instrument not in his possession.²⁰ Where an answer denied "any knowledge or information sufficient to form a belief, whether or not a notice was served on" the defendant "as required by law," it was held that the averment made issue only as to the lawfulness of the notice, and not as to the fact of notice.²¹

§ 1070. — — — AS TO MATTERS PRESUMABLY WITHIN KNOWLEDGE. The rule allowing a defendant to deny the material allegations of a complaint on information and belief, does not apply in those cases in which the matters or facts are necessarily or presumptively within the knowledge of the defendant. In such cases he must answer positively;¹ a denial on information and belief, in such cases, will be treated as evasive,² and will be held to be insufficient to tender an issue,³—that is, to put the plain-

Obvious denial not compliance with code, since it does not state that defendants have no belief on the subject sufficient to enable them to answer; the point was held unimportant, however, for the reason that the court made no finding upon the issue attempted to be made by the denial.—*Naftzger v. Gregg*, 99 Cal. 83, 87-8, 37 Am. St. Rep. 23, 33 Pac. 757.

¹⁹ *Wesson v. Judd*, 1 Abb. Pr. (N. Y.) 254.

²⁰ *Kellogg v. Baker*, 15 Abb. Pr. (N. Y.) 286.

²¹ *Soeding v. Bartlett*, 35 Mo. 90.

¹ *Loveland v. Garner*, 74 Cal. 298, 300, 15 Pac. 844; *Hayman v.*

Williams, 88 Cal. 146, 150, 25 Pac. 1111; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 75, 34 Pac. 527.

² *Curtis v. Richards*, 9 Cal. 38; *Loveland v. Garner*, 74 Cal. 298, 300, 15 Pac. 844.

³ CAL.—*Curtis v. Richards*, 9 Cal. 38; *Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621; *San Francisco Gas Co. v. San Francisco, City of*, 9 Cal. 453, 465; *Ord v. Steamer Uncle Sam, The*, 13 Cal. 369, 372; *Kuhland v. Sedgwick*, 17 Cal. 127; *Brown v. Scott*, 25 Cal. 196; *Vassault v. Austin*, 32 Cal. 607; *Curnow v. Happy Valley Blue Gravel & Hydraulic Co.*, 68

tiff to his proof,—unless the defendant positively and satisfactorily shows in his answer how it is that he is without knowledge;⁴ and this rule applies to corporations as well as to natural persons.⁵ But it has been said, however, that the rule does not apply in the case of a claimed lien, as to the sufficiency of the record thereof, where the claim is inartfully drawn, not in the language of the statute allowing and creating such liens, and a question might well arise as to the instrument's validity to create a lien.⁶ Where the claim of lien is in due and statutory form, properly recorded, and a copy thereof is set out or attached to the complaint, the rule applies.⁷ In those cases in which a defendant is aware before answering that he has a means of knowledge, of ascertaining whether the allegations of the complaint are true, he will not be permitted to answer on information and belief; e. g., in the case of the foreclosure of a mechanics' lien, when he can ascertain from an examination of the public records in the city or the county whether the plaintiff filed his claim to a lien, as alleged in the com-

Cal. 262, 265, 9 Pac. 149; Loveland v. Garner, 74 Cal. 298, 300, 15 Pac. 844; Mulcahy v. Buckley, 100 Cal. 484, 489, 35 Pac. 144. COLO.—Hanna v. Baker, 6 Colo. 303, 308. MONT.—State ex rel. Milsted v. Butte City Water Co., 18 Mont. 199, 56 Am. St. Rep. 574, 32 L. R. A. 697, 699, 44 Pac. 966. N. M.—Chicago, R. I. & E. P. R. Co. v. Wertheim, 15 N. M. 505, 30 L. R. A. (N. S.) 771, 110 Pac. 573. ORE.—Law Guarantee & Trust Soc. v. Hogue, 37 Ore. 544, 559, 62 Pac. 380, 63 Pac. 690; Mills' Estate, In re, 40 Ore. 424, sub nom. Knight v. Hamakar, 67 Pac. 107.

See note 30 L. R. A. (N. S.) 771.

⁴ Brown v. Scott, 25 Cal. 196; Vassault v. Austin, 32 Cal. 597;

Loveland v. Garner, 74 Cal. 298, 300, 15 Pac. 844; Shearman v. New York Cent. Mills, 1 Abb. Pr. (N. Y.) 187; Fales v. Hicks, 12 How. Pr. (N. Y.) 153; Richardson v. Wilton, 6 N. Y. Super. Ct. Rep. (4 Sandf.) 708.

⁵ San Francisco Gas Co. v. San Francisco, City of, 9 Cal. 453; Curnow v. Happy Valley Blue Gravel & Hydraulic Co., 68 Cal. 262, 265, 9 Pac. 149; Loveland v. Garner, 74 Cal. 298, 300, 15 Pac. 844; State ex rel. Melsted v. Butte City Water Co., 18 Mont. 199, 56 Am. St. Rep. 574, 44 Pac. 966.

⁶ Hayman v. Williams, 88 Cal. 146, 150, 25 Pac. 1111.

⁷ Mulcahy v. Buckley, 100 Cal. 484, 487, 35 Pac. 144.

plaint.⁸ Whether or not the provisions of the California statute, and of similar statutes, are applicable to a case in which the defendant is merely conscious of having the means of obtaining knowledge as to whether the allegations of the complaint denied are true, has not been passed upon by the courts.⁹ Mr. Justice Field well said, in an early California case, that "the statute imposes upon the defendant, if a natural person, and if a corporation, upon its officers and agents, the duty of acquiring the requisite knowledge or information respecting the matters alleged in the complaint, to enable him to answer it in the proper form;"¹⁰ and the same duty is imposed upon a defendant who proposes to deny an allegation in a complaint by averring that he has "no information or belief."¹¹ Thus, a denial on information and belief by the defendant that he executed a contract declared on, is not permissible;¹² or a denial on information and belief of matters of court record.¹³ When suit is upon a promissory note, it is presumed the defendant knows whether or not he made the note.¹⁴ In an action to recover from the defendants a deposit made in their hands in California, it was alleged in the complaint that they were copartners, and as such doing business in California, and elsewhere, as bankers and common carriers. The answer alleged that the defendants had never been in California, had never personally transacted business there, and had no personal knowledge and no information sufficient to form belief, and, therefore, denied that the plaintiff made such deposit. It was held that such alle-

⁸ Id.; *Hathaway v. Baldwin*, 17 Wis. 616; *Goodell v. Blumer*, 41 Wis. 444.

⁹ See *Mulcahy v. Buckley*, 100 Cal. 484, 487, 35 Pac. 144.

¹⁰ *San Francisco Gas Co. v. San Francisco, City of*, 9 Cal. 453, 467.

¹¹ *Mulcahy v. Buckley*, 100 Cal. 484, 489, 35 Pac. 144

¹² *Hanna v. Barker*, 6 Colo. 303, 308.

See, post, § 1072.

¹³ *Le Breton v. Stanley Contracting Co.*, 15 Cal. App. 429, 434, 114 Pac. 1028, 1030.

¹⁴ *San Francisco Gas Co. v. San Francisco, City of*, 9 Cal. 465.

gation was not irrelevant. From the allegation in the complaint, without explanations, the presumption would be that the money was deposited with the defendants in person, and that they had personal knowledge thereof, and consequently they could not be permitted to deny that allegation on information and belief, without first rebutting the presumption; and the statement was relevant and proper for that purpose.¹⁵

§ 1071. ——— CORPORATIONS—ACTS OF AGENTS. It has already been pointed out that the rule laid down in the preceding section relative to the right or ability to answer upon information and belief the allegations in a complaint with respect to matters and facts necessarily or presumptively within the knowledge of the defendant, applies to corporations as well as to natural persons.¹ Acts done by the agent of the defendant are also within this rule; and it applies to the case of a corporation defendant, for a corporation can as well know the acts of their agent as anything else.² And when the defendant is a corporation, it can not place its denials upon the ground of want of information and belief, if the matters denied are presumptively within the knowledge of any of its officers, even though the officer verifying the answer was himself without any information or belief upon the subject.³ Thus, in an action to foreclose a laborers' lien, where the answer admits the ownership of the property described in the complaint and on which the labor is alleged to have been performed and against which the lien is claimed; and also admits the employment by its superintendent of the plaintiff to perform labor thereon, a further answer to the allegations in the complaint "that the plain-

¹⁵ *Dovan v. Dinsmore*, 33 Barb. 503. *firming sub nom. Thorn v. New York Cent. Mills*, 10 How. Pr. (N. Y.) 10.

¹ See, ante, § 1070, footnote 5.

³ *Sloane v. Southern Cal. R. Co.*,

² *Shearman v. New York Cent. Mills*, 1 Abb. Pr. (N. Y.) 187, affirming sub nom. *Thorn v. New York Cent. Mills*, 10 How. Pr. (N. Y.) 10.

111 Cal. 668, 685, 33 L. R. A. 193, 44 Pac. 320.

tiff performed work and labor as a miner” averring that “defendant is not sufficiently informed to admit that the plaintiff performed work and labor as a miner upon the property of the defendant, and therefore denies said allegation,” such latter denial is evasive and does not raise an issue,⁴ or put the plaintiff to his proof. The court say that the corporation, having admitted ownership of the property and the employment of the plaintiff by its superintendent to perform labor on the property, it would be rash to presume that the defendant did not know that it was the property upon which the plaintiff performed the work and labor for which he sued; and that, possessing this knowledge, the defendant was bound to deny in positive terms, if it said anything at all.⁵

§ 1072. ——— RECOLLECTION AND BELIEF—PERSONAL ACTS AND TRANSACTIONS. In those cases in which the plaintiff, in his complaint, directly charges upon the defendant that he had made and entered into a certain agreement, a simple denial by the defendant in his answer, “according to his recollection and belief,” is insufficient, and must be treated as a mere evasion.¹ Thus, an allegation, by a corporation, by way of denial, that defendant did not know that it entered into a contract, or that plaintiff performed his part of the agreement, was held to be evasive and not permissible.²

§ 1073. ——— DAMAGES. A denial upon information and belief that the plaintiff suffered and sustained damages in the amount of twenty-five thousand dollars, and an averment upon information and belief that the plaintiff has not sustained any damage or damages whatsoever to exceed the sum of two thousand five hundred

⁴ Curnow v. Happy Valley Blue Gravel & Hydraulic Co., 68 Cal. 262, 265, 9 Pac. 149.

⁵ Id.

¹ Taylor v. Luther, 2 Sumn. 223, Fed. Cas. No. 13796.

See Harr. Ch. Pr. 181, 182; Coop. Eq. Pl. 341.

² Zany v. Rawhide Gold Min. Co., 15 Cal. App. 376, 114 Pac. 1027.

See, also, ante, § 1071.

dollars, which sum, and none other, is admitted by defendant as the damages suffered, with an offer to pay the same, the pleadings not being verified, the California court did not consider a model answer for imitation;¹ it being the employment of negative averments instead of denials. But in another California case,² an answer of this character was upheld, upon the principle that the mere form of a denial is not material, provided it directly traverse the allegation which it is intended to meet. A denial of the full amount claimed, and admission of a certain amount to be due, and a tender of that amount, all properly go to constitute one defense.³

§ 1074. ——— JUDGMENT. It has been said that if the complaint aver the recovery of a judgment against one of several defendants, the court in which it was recovered, and the date and amount of the same, the defendants, in their answer, may deny the same upon information and belief.¹ But the better rule, as already pointed out,² is thought to be that, as to matters of court record and other public records, an answer on information and belief is never permissible, for the reason that the defendant is presumed to have knowledge of those records, and by examining the records, which are always open to his inspection, he can ascertain the truth in the matter;³ and denials of information and belief, with the means of knowledge, are not permitted under the general rule.⁴

¹ *Chamon v. San Francisco, City of*, 1 Cal. Unrep. 509.

² *Hill v. Smith*, 27 Cal. 475, 476. See *Milwaukee Gold Extraction Co. v. Gordon*, 37 Mont. 209, 215, 95 Pac. 995, 997.

³ *Spencer v. Tooker*, 12 Abb. Pr. (N. Y.) 353, 354, 21 How. Pr. 333.

I Code Pl. and Pr.—99

¹ *Vassault v. Austin*, 32 Cal. 597.

² See, ante, § 1070, footnote 13.

³ *Mulcahy v. Buckley*, 100 Cal. 487, 35 Pac. 144; *Le Breton v. Stanley Contracting Co.*, 15 Cal. App. 429, 433, 114 Pac. 1028.

⁴ *Mullally v. Townsend*, 119 Cal. 52, 50 Pac. 1066.

§ 1075. — **GENERAL DENIAL ALLOWED WHEN—IN GENERAL.** We have already seen that denials, as to their matter, are either (1) general or (2) specific, and the characteristics of each have been sufficiently discussed.¹ Respecting when a general denial may be filed, it may be noted that a defendant, after specifically admitting some of the allegations in a complaint, may make a general denial as to the rest,² or as to all within certain specified folios or paragraphs.³ Where the facts alleged were presumptively within the defendant's knowledge, he must admit or deny positively,⁴ unless there be something special in the circumstances of the case.⁵ So held in action for assault,⁶ and of bond executed by defendant as surety.⁷ So in contract, where complaint specifically alleges contract;⁸ or charging defendant causing process to issue;⁹ of fact admitted by original defendant,¹⁰ and of goods sold and delivered to partner.¹¹

§ 1076. — **OF PART OF COMPLAINT.** In those cases in which the cause of action is divisible, or where several causes of action are stated, defendant in his answer may deny part or some or one of the causes of action, and

¹ See, ante, §§ 1058-1060.

² *Blaisdell v. Raymond*, 6 Abb. Pr. (N. Y.) 148; *Parshall v. Tillou*, 13 How. Pr. (N. Y.) 7; *Smith v. Wells*, 20 How. Pr. (N. Y.) 158.

³ *Gassett v. Crocker*, 9 Abb. Pr. (N. Y.) 39; *Blake v. Elred*, 18 How. Pr. (N. Y.) 240.

⁴ See, ante, § 1070.

⁵ CAL.—*Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621; *Brown v. Scott*, 25 Cal. 195; *Vassault v. Austin*, 32 Cal. 597. N. Y.—*Shearman v. New York Cent. Mills*, 1 Abb. Pr. 187, affirming *Thorn v. New York Cent. Mills*, 10 How. Pr. 19; *Edwards v. Lent*, 8 How. Pr. 28; *Lewis v. Acker*, 11 How.

Pr. 163; *Fales v. Hicks*, 12 How. Pr. 153. FED.—*Slater v. Maxwell*, 73 U. S. (6 Wall.) 268, 18 L. Ed. 796.

⁶ *Richardson v. Wilton*, 6 N. Y. Super. Ct. Rep. (4 Sandf.) 708.

⁷ *Hance v. Rumming*, 1 N. Y. Code Rep. (N. S.) 204, 2 E. D. Smith 48.

⁸ *Ord v. Steamer Uncle Sam*, The, 13 Cal. 369.

⁹ *Lawrence v. Derby*, 15 Abb. Pr. (N. Y.) 346, note, 24 How. Pr. 133.

¹⁰ *Forbes v. Waller*, 25 N. Y. 430, 25 How. Pr. 166.

¹¹ *Chapman v. Palmer*, 12 How. Pr. (N. Y.) 37, 38.

leave the residue unanswered;¹ but the effect of partial denial will be limited to the precise ground covered.² And in answering a complaint which contains several causes of action, and such answer contains several denials and defenses, each denial and defense pleaded should refer to the cause of action which it is intended to answer.³ Partial defenses must be pleaded as such.⁴

§ 1077. — EFFECT AND FORM OF DENIAL—IN GENERAL. In all those cases in which the defendant relies on a state of facts single and indivisible, it is not necessary to separately and distinctly state and number each mitigating circumstance.¹ If the pleadings are under oath, and the replications in response to a material averment of the answer undertake to deny, by saying “it is not true,” etc., the replication is evasive, and does not specifically deny the averment.² And only such allegations should be denied as defendant intends to controvert.³ A denial can not be made by implication.⁴ Each proposition should be separately denied.⁵ Nor should two or more grounds of defense be stated, when one of them would be as effectual in law as all of them.⁶ Such denials

¹ Kerr's Cyc. Cal. Code Civ. Proc., § 441. See *Smith v. Shufelt*, 3 N. Y. Code Rep. 175; *Tracy v. Humphrey*, 3 N. Y. Code Rep. 190, 5 How. Pr. 155; *Longworthy v. Knapp*, 4 Abb. Pr. (N. Y.) 115; *Genesee Mut. Ins. Co. v. Moynihan*, 5 How. Pr. (N. Y.) 322; *Willis v. Taggard*, 6 How. Pr. (N. Y.) 433; *Otis v. Ross*, 8 How. Pr. (N. Y.) 193, 11 N. Y. Leg. Obs. 343.

² *San Francisco Gas Co. v. San Francisco, City of*, 9 Cal. 453; *Anable v. Conklin*, 25 N. Y. 470, affirming 16 Abb. Pr. (N. Y.) 286; *Fairchild v. Rushmore*, 21 N. Y. Super. Ct. Rep. (8 Bosw.) 689.

³ *Hindman v. Edgar*, 24 Ore. 181, 17 Pac. 862.

See Ore. Code, § 73.

⁴ *McDaniel v. Pressler*, 3 Wash. 636, 29 Pac. 209.

¹ *Kinyon v. Palmer*, 20 Iowa 138.

² *Verzan v. McGregor*, 23 Cal. 339.

³ *Newell v. Doty*, 33 N. Y. 83.

⁴ *West v. American Exch. Bank*, 44 Barb. (N. Y.) 175.

⁵ Kerr's Cyc. Cal. Code Civ. Proc., § 437. See *More v. Del Valle*, 28 Cal. 170; *Fitch v. Bunch*, 30 Cal. 208. See *Westbay v. Gray*, 116 Cal. 660, 663, 48 Pac. 800; *Duckworth v. Watsonville Water & Light Co.*, 150 Cal. 520, 530, 89 Pac. 338.

⁶ *Lord v. Tyler*, 31 Mass. (14 Pick.) 164.

would be bad for duplicity, which must be avoided.⁷ A specific denial of one or more allegations is held to be an admission of all others well pleaded.⁸ Denials of several allegations are but one defense.⁹ A special traverse, as originally devised and used, was simply a mode by which the pleader in the inducement spread his own right or title upon the record, adding to this implied denial of the opposing claim a direct denial under the *absque hoc*.¹⁰ The inducement in such a traverse must on its face give the pleader a good right or title, or the whole plea is bad.¹¹ Each denial of an answer must be regarded as applying to the specific allegation it purports to answer, and not as forming a part of an answer to some or specific and entirely independent allegation.¹² A denial in an answer should by its words so describe the allegations of the complaint which the pleader intends to controvert that any person of intelligence can identify them.¹³

§ 1078. ——— FORM AND SUFFICIENCY OF DENIAL. Where the defendant's answer to a complaint raises material issues upon the matters alleged therein, the answer is not demurrable for want of sufficient facts.¹ And although an answer may be defective, if it can be

⁷ Hooper v. Jellison, 39 Mass. (22 Pick.) 250; Cahoon v. Bank of Utica, 7 N. Y. 486, 7 How. Pr. 401, 1 Seld. Notes 31, reversing 7 How. Pr. 134.

⁸ De Ro v. Cordes, 4 Cal. 117; Caulfield v. Saunders, 17 Cal. 569; Archer v. Boudinet, 1 N. Y. Code Rep. (N. S.) 372; Reilly v. Cook, 13 Abb. Pr. (N. Y.) 255, 22 How. Pr. 93; Walrod v. Bennett, 6 Barb. (N. Y.) 144; Corwin v. Corwin, 9 Barb. (N. Y.) 219; reversed on another point in 6 N. Y. 342, 57 Am. Dec. 453; Pardee v. Schenck, 11 How. Pr. (N. Y.) 500; Harbeck v. Craft, 11 N. Y. Super. Ct. Rep. (4

Duer) 122; Whitlock v. McKech-
nie, 14 N. Y. Super. Ct. Rep. (1
Bosw.) 427.

See, also, ante, §§ 1061-1063.

⁹ Otis v. Ross, 8 How. Pr. (N. Y.) 193, 11 N. Y. Leg. Obs. 343.

¹⁰ Fox v. Nathans, 33 Conn. 348.

¹¹ Id.

¹² Racouillat v. Rene, 32 Cal. 450.

¹³ Mattison v. Smith, 24 N. Y. Super. Ct. Rep. (1 Rob.) 706, 19 Abb. Pr. 288.

¹ Bennett v. Tacoma Light & Water Co., 3 Wash. 337, 28 Pac. 520.

See, also, post, §§ 1087-1090.

gathered therefrom that an issue is tendered by the pleading upon a material matter, it is error to render judgment on the pleadings in favor of the plaintiff.² The denial of an allegation need not be absolute nor in any particular form.³ Any allegation in an answer which, if found to be true, necessarily shows that the allegation of the complaint as to the same matter is untrue is a good traverse, and sufficient as a denial.⁴ Thus, after a literal denial as to the widening and deepening of a ditch,⁵ the defendant added: "But, on the contrary, defendant alleges that said ditch is no wider nor is it any deeper through the said lands of plaintiff than it was when it was first constructed,"⁶—and this allegation was held to be sufficient to put in issue the allegations of the complaint.⁷ But it is a rule of code pleading that denials must be specific, and that it must clearly and unequivocally appear what the pleader intends to deny.⁸ It is held good pleading to deny wholly the wrong with which one is charged, putting the party alleging it to the proof, relying upon his inability to make any proof, or proof of the whole wrong.⁹ A stipulation by the parties may take the place of denials in an answer.¹⁰

§ 1079. — DEFECTIVE DENIALS—EFFECT OF. A denial may be defective both as to the matter and as to the

² Rourk v. Miller, 3 Wash. 73, 27 Pac. 1029.

³ Gee v. Culver, 12 Ore. 228, 6 Pac. 775.

⁴ Churchill v. Baumann, 95 Cal. 541, 545, 30 Pac. 770; Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 922.

⁵ As to literal denials, see, ante, § 1063.

⁶ Burris v. People's Ditch Co., 104 Cal. 248, 253, 37 Pac. 922.

⁷ Id.; Goddard v. Fulton, 21 Cal. 430, 436; Way v. Ogelsby, 45 Cal.

655; Robinson v. Merrill, 87 Cal. 11, 14, 52 Pac. 162.

See, also, ante, § 1058, footnotes 15, 16.

⁸ Denver & New Orleans Const. Co. v. Stout, 8 Colo. 61, 5 Pac. 627; Power v. Gum, 6 Mont. 5, 9 Pac. 575.

⁹ Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co., 11 Colo. 223, 17 Pac. 760.

¹⁰ Alta Silver Min. Co. v. Alta Placer Min. Co., 78 Cal. 629, 21 Pac. 373.

form of allegation. If defective as to form,—e. g., constituting a negative pregnant,¹—it will be insufficient to raise an issue of fact and put the plaintiff to his proof. Where defective as to matter it may or may not be evasive or insufficient, and therefore inadequate to raise an issue of fact. An illustration of a plea defective both as to form and irregular as to matter, being an affirmative and not a negative denial, and yet sufficient to raise an issue of fact, has already been given.² Other illustrations of defective denials are: An answer filed six months after filing a complaint, which simply denies that the plaintiffs are then the owners and in actual possession of the premises claimed, is a virtual confession of the complaint, and is not a denial.³ Where an answer does not deny any of the facts upon which the plaintiff's claim for a lien is based, but denies indebtedness to the plaintiff, and that the plaintiff had any lien, the denials are to be deemed conclusions of law, and no issues of fact are raised by the pleadings.⁴ So, a denial in a pleading of "legal notice * * * so as in any way to affect * * * the title derived," etc., does not put in issue the allegation of notice in the pleading answered.⁵ So, an answer which states that it "does not deny or admit" the allegations of the plaintiff's complaint does not constitute "a general or specific denial," and is, therefore, insufficient under provisions⁶ of the Washington Code of Procedure.⁷ So, as a general rule, where an answer does not deny the facts stated in a paragraph of the complaint, but controverts the conclusions drawn by the pleader from the facts stated, the answer does not traverse any material fact.⁸ But where an answer is

¹ See, ante, §§ 1061-1063.

² See, ante, § 1078, footnotes 5-7 and text going therewith.

³ Leggatt v. Stewart, 5 Mont. 107, 2 Pac. 320.

⁴ Merrigan v. English, 9 Mont. 113, 22 Pac. 454.

⁵ Seaman v. Hax, 14 Colo. 536, 24 Pac. 461.

⁶ Wash. Code of Proc., § 185.

⁷ Lake v. Steinbach, 5 Wash. 659, 33 Pac. 767.

⁸ Id. See, also, post, § 1085.

defective in its denials, if a trial is had in all respects, and evidence taken as though it properly raised an issue, without any objection in the court below to the defective denials, the plaintiff can not object upon an appeal taken by him that the answer raised no issue;⁹ or it may be cured by the plaintiff's reply, in those jurisdictions in which a reply is provided for;¹⁰ or it may be aided by proof.¹¹ And imperfect and defective denials, if acted upon as sufficient at a trial, are in no sense admissions of the allegations of a pleading which are attempted to be denied.¹²

§ 1080. — DENIAL OF CONDITIONS PRECEDENT—EXCUSE FOR NONPERFORMANCE. The objection that conditions have not been performed must be specially set up.¹ Where performance is prevented by the act of the plaintiff, excuse for nonperformance should be set out in the answer.²

§ 1081. — DENIAL OF DEED—ON INFORMATION AND BELIEF. An allegation in an answer by an administrator that the defendant "avers, on information and belief, that no such deed or deeds were ever executed," has been held to be a sufficient denial, under the California statute, of the averment in the complaint that defendant's intestate executed and delivered the particular deeds referred to;¹ although this doctrine has been denied in other jurisdictions with different statutes.² The reason assigned

⁹ *Klopper v. Levy*, 98 Cal. 525, 33 Pac. 444.

See, also, ante, § 1056.

¹⁰ *James v. McPhee*, 9 Colo. 486, 13 Pac. 535.

¹¹ *Johnson v. Bailey*, 17 Colo. 59, 28 Pac. 81.

¹² *Loftus v. Fischer*, 106 Cal. 616, 39 Pac. 1064.

See, also, ante, § 1058, footnotes 17 and 18.

¹ *Happe v. Stout*, 2 Cal. 460;

Rodgers v. Cody, 8 Cal. 324; *People ex rel. Hastings v. Jackson*, 24 Cal. 630, 632.

² *Crist v. Armour*, 34 Barb. (N. Y.) 378; *Garvey v. Fowler*, 6 N. Y. Super. Ct. Rep. (4 Sandf.) 665, 10 N. Y. Leg. Obs. 16.

¹ *Thompson v. Lynch*, 29 Cal. 189; *Roussin v. Stewart*, 33 Cal. 208; *Jones v. Petaluma, City of*, 36 Cal. 230.

² *Therasson v. McSpedon*, 2

for the rule is the fact that the intent of the statute is fully carried out by excluding parol testimony to contradict a deed; but where parties admit the real facts of the transaction in their pleadings, these admissions are to be taken as modifications of the instrument.³

§ 1082. — DENIAL OF DEMAND. It has been held that in an action of contract, the defense that no demand was made before the commencement of the suit can not be taken advantage of, unless pleaded in the answer.¹ A denial that the demand was made on a certain day, "as alleged in the complaint," is a denial that the demand was made on the particular day stated in the complaint, when the statement of the demand is not qualified as to the manner of its being made.²

§ 1083. — DENIAL OF FRAUD—IN GENERAL. A defendant may deny fraud in a transaction which is actually tainted by it; for what constitutes fraud, particularly fraud in law, is often a matter of much diversity of opinion. Thus, one charged with fraudulently obtaining a warrant drawn in plaintiff's favor, and fraudulently procuring the payment of the same, may rest his defense on a general denial; he is not required to plead and prove from whom he obtained the warrant.¹ But a general denial of fraud in answer to a bill of discovery is not

Hilt. (N. Y.) 1; Hackett v. Richards, 3 E. D. Smith (N. Y.) 13; Swinburn v. Stockwell, 58 How. Pr. (N. Y.) 312.

Denial on information and belief held good under the New York practice, in other cases.—Dunham v. Gates, 1 Hoffm. Ch. (N. Y.) 185; Wilson v. Doran, 110 N. Y. 101, 15 N. Y. Civ. Proc. Rep. 96, 17 N. E. 688, reversing 39 Hun 88; Davis v. Potter, 2 N. Y. Code Rep. 99, 4 How. Pr. 155; Sackett v.

Havens, 7 Abb. Pr. (N. Y.) 371, note; M'Auley v. Bromell & B. Printing Co., 14 Abb. N. C. (N. Y.) 316, 5 N. Y. Civ. Proc. Rep. 431, 67 How. Pr. 252.

³ Lee v. Evans, 8 Cal. 424.

¹ Rabshul v. Lack, 35 Mo. 316.

² Hoopes v. Meyer, 1 Nev. 433.

As to necessity for demand in ejectment, see note 120 Am. St. Rep. 52.

¹ Crouch v. Deremore, 59 Iowa 43, 12 N. W. 759.

enough; in such case the answer must be to every material allegation.²

§ 1084. ——— SUFFICIENCY OF. A general denial of fraud, such as is set out in the preceding section, is not enough where facts are alleged in the complaint from which the court may infer fraud. In such case the specific acts and representations alleged in the complaint must be each denied.¹

§ 1085. ——— DENIAL OF CONCLUSIONS—OF THE PLEADER AND LEGAL CONCLUSIONS. We have already discussed fully conclusions in pleading, both conclusions of the pleader¹ and conclusions of law,² embodied in a complaint, and pointed out that it is never necessary to deny such allegations. Hence, in the case where a defendant in his answer merely denies a conclusion of law resulting from the facts contained in the complaint, it is insufficient;³ and the facts stated in the complaint will be deemed admitted.⁴ A denial that the defendant became or was lawfully bound by a judgment declared on, is only a denial of a conclusion of law.⁵ Nor is it a denial in an action

² *Pettit v. Chandler*, 3 Wend. (N. Y.) 618.

¹ *Litchfield v. Pelton*, 6 Barb. (N. Y.) 187; *Dykers v. Woodard*,

⁷ *How. Pr.* (N. Y.) 313; *Churchill v. Bennett*, 8 How. Pr. (N. Y.) 309.

¹ See, ante, § 714.

² See, ante, § 715.

³ *CAL.*—*Nelson v. Murray*, 23 Cal. 338; *Wormouth v. Hatch*, 33

Cal. 128; *Lightner v. Menzell*, 35 Cal. 452; *Christy v. Dana*, 42 Cal.

174; *Turner v. White*, 73 Cal. 299, 14 Pac. 794. *MINN.*—*Holgate v.*

Broome, 8 Minn. 243. *NEV.*—*Hoopes v. Meyer*, 1 Nev. 433.

N. Y.—*Drake v. Cockroft*, 4 E. D. Smith 34, 1 Abb. Pr. 203, 10 How.

Pr. 377; *Witherspoon v. Van Dolar*, 15 How. Pr. 266; *Fosdick v. Goff*, 22 How. Pr. 158. *WASH.*—*Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767.

⁴ *Busenius v. Coffee*, 14 Cal. 91; *Nelson v. Murray*, 23 Cal. 338; *Lay v. Neville*, 25 Cal. 549; *Richardson v. Smith*, 29 Cal. 529, 531-2; *Kidwell v. Ketler*, 146 Cal. 12, 18, 79 Pac. 514; *Salmon v. Olds*, 9 Ore. 488, 489; *Krewson v. Purdom*, 11 Ore. 266, 268, 3 Pac. 822; *Lake v. Steinbach*, 5 Wash. 659, 663, 32 Pac. 767; *Wolf Co. v. Northwestern Dairy Co.*, 55 Wash. 665, 670, 104 Pac. 1123.

⁵ *People ex rel. Central Pac. R. Co. v. San Francisco Supervisors*, 27 Cal. 655.

for the possession of personal property to allege that defendant did not at any time wrongfully take and detain the property of the plaintiff.⁶ In ejectment, where the answer, in reference to the allegation of entry and ouster, denies that the defendant wrongfully and unlawfully entered and dispossessed the plaintiff, this does not constitute a denial, but is rather an admission; it admits entry and ouster, simply denying that it was wrongful and unlawful,⁷—since in the absence of a denial of the allegations of the complaint in positive and unequivocal terms they are to be taken as true.⁸ The same is true of a denial that a seizure was wrong and unlawful,—it is argumentative and admits the seizure.⁹ So a denial that the plaintiff has any interest whatever in the premises mentioned in the complaint is insufficient.¹⁰ So of an averment that “the plaintiff is not the real party in interest, nor is he an executor,” etc.¹¹ So of an answer which, without denying any fact stated in the complaint, merely says that “the defendant denies that the plaintiff is entitled to the money demanded.”¹² Where, however, the allegation of the plaintiff is itself couched in the form of a conclusion of law, a denial in the same form will be admissible, and efficient for all purposes.¹³ A mixed question of law and facts was under the old system

⁶ *Woodworth v. Knowlton*, 22 Cal. 168; *Richardson v. Smith*, 29 Cal. 529.

⁷ *Busenius v. Coffee*, 14 Cal. 91, 93; *Lay v. Neville*, 25 Cal. 545, 549; *Dondero v. O'Hara*, 3 Cal. App. 633, 639, 86 Pac. 985, 987.

Denying plaintiff's title only, admits the ejectment.—*Dondero v. O'Hara*, 3 Cal. App. 633, 86 Pac. 985.

⁸ See footnote 4, this section; *Scovill v. Barney*, 4 Ore. 288, 290.

⁹ *Lay v. Neville*, 25 Cal. 545, 549; *Salmon v. Olds*, 9 Ore. 488, 489.

¹⁰ *Bentley v. Jones*, 4 How. Pr. (N. Y.) 202.

¹¹ *Russell v. Clapp*, 7 Barb. (N. Y.) 482, 3 N. Y. Code Rep. 64, 4 How. Pr. 347.

¹² *Drake v. Cockroft*, 4 E. D. Smith (N. Y.) 34, 1 Abb. Pr. 203, 10 How. Pr. 377.

Compare: *Higgins v. Freeman*, 9 N. Y. Super. Ct. Rep. (2 Duër) 650.

¹³ *Anonymous*, 2 N. Y. Code Rep. 67; *Morrow v. Cougan*, 3 Abb. Pr. (N. Y.) 328; *Wager v. Ide*, 14 Barb. (N. Y.) 468; *McKnight v. Hunt*, 10 N. Y. Super. Ct. Rep. (3

traversable.¹⁴ Within certain limits this rule is applicable to the present system; e. g., as where plaintiff alleged that defendant owed him a certain sum, an answer denying the indebtedness is sufficient.¹⁵ A denial which is itself a conclusion of law raises no issue, as where an answer states in general terms that a municipal ordinance is illegal and void.¹⁶

§ 1086. MATTERS THAT MUST BE PLEADED. A denial, either (1) general, (2) special, (3) according to or upon information and belief, or (4) for want of information to form a belief,¹ merely puts the plaintiff on proof of his cause. In those cases in which the defendant has any affirmative defenses upon which he wishes to rely, he must specially plead them, or they can not be shown in defense on the trial,² or advantage taken of any proof offered on the trial disclosing or establishing such defenses,³—because they are not within the issues in the case.⁴ Thus, the defendant must plead abandonment of land,⁵—although it has been said that where the plaintiff relies upon naked possession, the plaintiff may prove abandonment under the general issue;⁶ abatement of

Duer) 615; *Davis v. Hoppock*, 13 N. Y. Super. Ct. Rep. (6 Duer) 256.

¹⁴ *Stephen on Pleading* (Williston's ed.), p. 222.

¹⁵ See *Kenney v. Osborne*, 14 Cal. 112; *Westlake v. Moore*, 19 Mo. 556.

¹⁶ *People ex rel. Central Pac. R. Co. v. San Francisco Supervisors*, 27 Cal. 655; *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. 514; *Richards v. Dower*, 81 Cal. 44, 22 Pac. 304; *Balfour v. Davis*, 14 Ore. 47, 12 Pac. 89.

¹ See, ante, § 1056.

² *Smith v. Owens*, 21 Cal. 11, 24;

Cummiskey v. Williams, 20 Mo. App. 611.

³ *Smith v. Owens*, 21 Cal. 11; *McComb v. Reed*, 28 Cal. 284, 87 Am. Dec. 118.

⁴ As to pleas, see, post, §§ 1093-1169.

⁵ *St. John v. Kidd*, 26 Cal. 263, 266; *Wilson v. Cleaveland*, 30 Cal. 192, 89 Am. Dec. 85.

⁶ *Wilson v. Cleaveland*, 30 Cal. 192, 89 Am. Dec. 85; *Bell v. Bed Rock Tunnel & Min. Co.*, 36 Cal. 214, 218.

In code practice there is no general issue. See footnote 12, this section.

action;⁷ another cause pending,⁸—which is to be raised by demurrer, in California, where the fact appears upon the face of the complaint,⁹ otherwise by answer;¹⁰ accord and satisfaction,¹¹—because under procedural code prac-

⁷ CAL.—Hentsch v. Porter, 10 Cal. 555; Sweeney v. Stanford, 67 Cal. 635, 636, 8 Pac. 444; Phillips v. Goldtree, 74 Cal. 151, 155, 156, 13 Pac. 313, 15 Pac. 451; Southern Pac. R. Co. v. Purcell, 77 Cal. 69, 18 Pac. 886; Ontario State Bank v. Tibbits, 80 Cal. 68, 70, 22 Pac. 66. OKLA.—Swope v. Burnham, 6 Okla. 736, 742, 52 Pac. 924. S. D.—Heegaard v. South Dakota Land & Trust Co., 3 S. D. 569, 575, 54 N. W. 656.

Abatement of action for failure to comply with statute by copartnership or corporation, does not apply to an assignee of the claim by such copartnership or corporation, because the disability is personal to the copartnership or corporation.—Wing Ho v. Baldwin, 70 Cal. 194, 195, 11 Pac. 565.

Amendment not allowed where original answer did not set up the defense affirmatively in Heegaard v. South Dakota Land & Trust Co., 3 S. D. 575, 596, 54 N. W. 656.

⁸ Larco v. Clements, 36 Cal. 132; Felch v. Beaudry, 40 Cal. 439; Walsworth v. Johnson, 41 Cal. 61; Coubrough v. Adams, 70 Cal. 374, 11 Pac. 634.

In ejectment pendency of another action is not ground for abatement, unless the same title, or the same injury, or the same subject-matter, is in controversy in both actions; because a plaintiff may have two actions against the same defendant for the recovery of the possession of the same land pending at the same time, if

the section is brought on a title acquired after the commencement of the first action.—CAL.—Vance v. Olinger, 27 Cal. 358, 359; Marshall v. Shafter, 32 Cal. 195; Larco v. Clements, 36 Cal. 132; Martin v. Splivalo, 69 Cal. 611, 615, 11 Pac. 484; Leonard v. Flynn, 89 Cal. 535, 541, 23 Am. St. Rep. 500, 26 Pac. 1097. COLO.—Arnold v. Woodward, 14 Colo. 164, 167, 23 Pac. 444. KAN.—Buettinger v. Hurley, 34 Kan. 585, 589, 9 Pac. 197. N. Y.—Mandeville v. Avery, 124 N. Y. 376, 21 Am. St. Rep. 678, 26 N. E. 951. UTAH—Beardsley v. Morrison, 18 Utah 478, 483, 72 Am. St. Rep. 795, 798, 56 Pac. 303.

—Action for unlawful detainer does not abate action in ejectment.—Buettinger v. Hurley, 34 Kan. 585, 589, 9 Pac. 197.

—Plea of defendant must clearly allege that the cause of action in the first suit is identical with that in second, to be sufficient.—Sale to use of Bashe v. Boyce, 72 Md. 140, 20 Am. St. Rep. 458, 7 L. R. A. 272, 19 Atl. 366; Beardsley v. Morrison, 18 Utah 478, 483, 72 Am. St. Rep. 795, 798, 56 Pac. 303.

⁹ Kerr's Cyc. Cal. Code Civ. Proc., 2nd ed., § 430, subd. 3.

See full discussion, ante, §§ 927-934.

¹⁰ Kerr's Cyc. Cal. Code Civ. Proc., § 433.

¹¹ Sweet v. Burdett, 40 Cal. 97; Hogan v. Burns, 4 Cal. Unrep. 62, 33 Pac. 631; Berdell v. Bissell, 6 Colo. 162; Harvey v. Denver &

tice there is no general issue under which it may be proved;¹² composition with creditors;¹³ counter-claim must be especially pleaded;¹⁴ so also must disclaimers,¹⁵ equitable titles, and defenses and estoppels,¹⁶ and eviction;¹⁷ so also must excuse and justification,—e. g., attachment and execution.¹⁸ Issue of bona fide purchase must be affirmatively pleaded;¹⁹ and an issue of former recovery²⁰ must be specially set up in the answer. Fraud must be specially pleaded;²¹ and the same is true of a grant of an easement or servitude;²² also that the plaintiff is not the real party in interest and release.²³ It is held by one line of cases,—and the early California cases belong to this class,—that the statute of frauds must be specially pleaded,²⁴ that the legal question can not be

R. G. R. Co., 44 Colo. 258, 130 Am. St. Rep. 120, 99 Pac. 31.

¹² Berdell v. Bissell, 6 Colo. 162.

¹³ Smith v. Owens, 21 Cal. 11.

¹⁴ Shaw v. Andrews, 9 Cal. 74.

As to counter-claim, see, post, §§ 1178-1187.

¹⁵ Kerr's Cyc. Cal. Code Civ. Proc., § 739; Landis v. Turner, 14 Cal. 573, 576; De Uprey v. De Uprey, 27 Cal. 329, 331, 87 Am. Dec. 81.

¹⁶ Flandeau v. Downey, 23 Cal. 354; Stone v. Elkins, 24 Cal. 124, 146; Clarke v. Huber, 25 Cal. 597; Carpenter v. Oakland, City of, 30 Cal. 439; Bruck v. Tucker, 42 Cal. 346; Brodrib v. Brodrib, 56 Cal. 563; Scroggin v. Johnston, 45 Neb. 714, 64 N. W. 236.

¹⁷ Piercy v. Sabin, 10 Cal. 22, 30, 70 Am. Dec. 692.

¹⁸ Thornburgh v. Hand, 7 Cal. 554; Treat v. Liddel, 10 Cal. 303; Killey v. Scannell, 12 Cal. 73; Grimes v. Fall, 15 Cal. 66; Bickerstaff v. Dóub, 19 Cal. 12; Stout v. Macy, 22 Cal. 650; McComb v. Reed, 28 Cal. 281.

¹⁹ Holdsworth v. Shannon, 113 Mo. 508; Weber v. Rothchild, 15 Ore. 385, 15 Pac. 650; Simpkins v. Winsor, 21 Ore. 382, 28 Pac. 72.

²⁰ Marshall v. Shafter, 32 Cal. 176.

²¹ People ex rel. Central Pac. R. Co. v. San Francisco Supervisors, 27 Cal. 655.

²² American Co. v. Bradford, 27 Cal. 360.

Easement claimed to have been created by agreement between the parties, an allegation that the agreement was in writing is not necessary.—Emerson v. Bergin, 76 Cal. 197, 18 Pac. 264. See Bradford Investment Co. v. Joost, 117 Cal. 204, 207, 48 Pac. 1083.

²³ Turner v. Caruthers, 17 Cal. 431.

²⁴ ALA.—Espalla v. Wilson, 86 Ala. 487, 5 S. E. 867. CAL.—Osborne v. Endicott, 6 Cal. 149, 65 Am. Dec. 498; Burt v. Wilson, 28 Cal. 632, 87 Am. Dec. 142; Border v. Conklin, 77 Cal. 330, 336, 9 Pac. 513. GA.—Draper v. Macon Dry Goods Co., 103 Ga. 661, 68 Am. St.

raised by demurrer,²⁵ unless the infirmity appears upon the face of the complaint,²⁶ which is true in California²⁷ and elsewhere; but there is another line of cases, announcing the prevailing doctrine, supported by the later California cases,²⁸ to the effect that when the plaintiff relies for recovery upon a contract which the statute requires to be in writing, the defendant may raise the question of the statute of frauds under a general denial of the contract,²⁹ because where the contract is denied,

Rep. 136, 30 S. E. 566. IDAHO—Kraft v. Greathouse, 1 Idaho 254, 259. ILL.—Tarleton v. Vietes, 68 Ill. (1 Gilm.) 470, 41 Am. Dec. 193; Switzer v. Skiles, 8 Ill. (3 Gilm.) 529, 44 Am. Dec. 723. NEV.—Levy v. Ryland, 32 Nev. 460, 469, 109 Pac. 905, 908. N. C.—Jordan v. Greensboro Furnace Co., 126 N. C. 143, 78 Am. St. Rep. 644, 35 S. E. 247. TENN.—Clitty v. Southern Queen Mfg. Co., 93 Tenn. 276, 42 Am. St. Rep. 919, 24 S. W. 121. VT.—Battell v. Malot, 58 Vt. 271, 285, 5 Atl. 479. VA.—Robertson v. Smith, 94 Va. 250, 64 Am. St. Rep. 723, 26 S. E. 579.

See note 78 Am. St. Rep. 648, 657.

As to presumption contract in writing, see, ante, § 992.

For a discussion of plea of statute of frauds, see, post, §§ 1147, 1148.

²⁵ Broder v. Conklin, 77 Cal. 330, 336, 9 Pac. 513; Levy v. Ryland, 32 Nev. 460, 469, 109 Pac. 905, 908.

See note 78 Am. St. Rep. 653.

²⁶ Manning v. Pippen, 86 Ala. 357, 11 Am. St. Rep. 46, 5 So. 572; Barr v. O'Donnell, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429; Switzer v. Kiles, 8 Ill. (3 Gilm.) 529, 44 Am. Dec. 723; Speyer v.

Desjardins, 144 Ill. 641, 36 Am. St. Rep. 473, 32 N. E. 283; Wentworth v. Wentworth, 2 Minn. 277, 72 Am. Dec. 97.

²⁷ See, ante, §§ 912, 914.

²⁸ See Feeney v. Howard, 79 Cal. 525, 12 Am. St. Rep. 162, 4 L. R. A. 626, 21 Pac. 984.

²⁹ Wynn v. Garland, 19 Ark. 34, 68 Am. Dec. 190. COLO.—Israel v. Day, 17 Colo. App. 200, 207, 68 Pac. 122; Von Trotha v. Bamberger, 15 Colo. 14, 25 Pac. 88. KAN.—Wiswel v. Teft, 5 Kan. 266. KY.—Talbot v. Bowen, 8 Ky. (1 A. K. Marsh.) 463, 10 Am. Dec. 747; Brown v. East, 21 Ky. (5 T. B. Mon.) 405; Hocker v. Gentry, 60 Ky. (3 Metc.) 474. MD.—Billingslea v. Ward, 33 Md. 51; Semmes v. Worthington, 34 Md. 317; Hamilton v. Thirston, 93 Md. 213, 220, 48 Atl. 709. MICH.—Third Nat. Bank v. Steel, 129 Mich. 438, 88 N. W. 1052. MINN.—Fontaine v. Bush, 40 Minn. 141, 12 Am. St. Rep. 722, 41 N. W. 465. MO.—Hook v. Turner, 22 Mo. 333. MONT.—Ryan v. Dunphy, 4 Mont. 356, 1 Pac. 712. N. J.—Walker v. Hill, 21 N. J. Eq. 203. N. C.—Bonham v. Craig, 80 N. C. 228. S. C.—Pray v. Sandifer, 5 Rich. Eq. 180. TEX.—Patten v. Rucker, 29 Tex. 411. UTAH—Steed v.

the plaintiff must produce legal evidence of its existence and validity.³⁰ Among other things required to be especially pleaded are: The statute of limitations;³¹ subsequently-acquired title;³² tax-titles;³³ unworkmanlike manner in which work was done;³⁴ want of capacity to sue;³⁵ that items are overcharged in an account;³⁶ that action is prematurely brought;³⁷ and the defense of privileged communication in an action for libel.³⁸ Prior claim to appropriation of water in a third person must be specially pleaded.³⁹

§ 1087. SHAM, IRRELEVANT AND FRIVOLOUS DENIALS AND ANSWERS—IN GENERAL. A “sham” denial or answer is one regular in form but false in matter, known to the pleader to be false, and put in for the purpose of delay, or for some other unworthy object.¹ An “irrelevant” denial or answer is one that has no substantial relation to the controversy between the parties in the action in which it is filed,² and, in its broader meaning, includes

Harvey, 18 Utah 367, 72 Am. St. Rep. 789, 54 Pac. 1011. VA.—Rowton v. Rowton, 1 Hen. & M. 91. WIS.—Whiting v. Gould, 2 Wis. 593. WYO.—Williams-Hayward Shoe Co. v. Brooks, 9 Wyo. 424, 430, 64 Pac. 342. FED.—May v. Sloan, 101 U. S. 237, sub nom. May v. Rice, 25 L. Ed. 797; Dunphy v. Ryan, 116 U. S. 496, 29 L. Ed. 704, 6 Sup. Ct. Rep. 407; Buhl v. Stephens, 84 Fed. 926; Baird Investment Co., Thomas J., v. Harris, 126 C. C. A. 217, 209 Fed. 296.

³⁰ Cozene v. Graham, 2 Pal. Ch. (N. Y.) 181.

³¹ Kerr's Cyc. Cal. Code Civ. Proc., § 758; ante, § 726; Grattan v. Wiggins, 23 Cal. 16; Schroeder v. Jahns, 27 Cal. 278; Sage v. Culver, 147 N. Y. 241, 41 N. E. 513, affirming 71 Hun 42, 24 N. Y. Supp. 514.

Full discussion of plea of statute

of limitations will be found, post., §§ 1149-1156.

³² Moss v. Shears, 30 Cal. 468.

³³ Russell v. Mann, 22 Cal. 132; McMinn v. O'Connor, 27 Cal. 246.

³⁴ Kendall v. Vallejo, 1 Cal. 371.

³⁵ California Steam Nav. Co. v. Wright, 8 Cal. 585.

³⁶ Terry v. Sickles, 13 Cal. 427.

³⁷ Elder v. Rourke, 27 Ore. 363, 41 Pac. 6.

³⁸ Gilman v. McClatchy, 111 Cal. 606, 44 Pac. 241; Goodwill v. Daniels, 87 Mass. (7 Allen) 61; Langton v. Hagerty, 35 Wis. 150; Bell v. Parke, 11 Ir. C. L. 413.

³⁹ Humphreys v. McCall, 9 Cal. 59.

¹ See discussion and cases cited, ante, §§ 739, 1052; also 1 Chitty on Pleading (16th Am. ed.), p. 567.

² MINN.—Morton v. Jackson, 2 Minn. 219, 222. MO.—Fox v. Web-

and is synonymous with "irrelevant"³ and "impertinent."⁴ The object of requiring verification of an answer⁵ is to secure and insure good faith and prevent false statements in denials and defenses set up. At common law, the court could hear evidence to determine the bona fides or falsity of a defense, denial or answer, the plaintiff being permitted to file a motion to strike out the answer, supported by affidavits;⁶ and this procedure has been recognized as a proper practice under the procedural codes,⁷ but has never obtained the approval of the higher courts, the general, if not the universal practice at the present time being to refuse to disturb an answer containing a material allegation when it requires

ster, 46 Mo. 181, 185. N. Y.—*Struver v. Ocean Ins. Co.*, 2 Hilt. 475, 9 Abb. Pr. 23; *Jeffras v. McKillop & Sprague Co.*, 2 Hun 351, 4 Thomp. & C. 578; *Goodman v. Robb*, 41 Hun 605; *Seward v. Miller*, 6 How. Pr. 312; *Nichols v. Jones*, 6 How. Pr. 355, 358; *Walker v. Hewitt*, 11 How. Pr. 395, 398; *Fabbicotti v. Launitz*, 5 N. Y. Super. Ct. Rep. (3 Sandf.) 743, 1 N. Y. Code Rep. (N. S.) 121; *Carpenter v. Bell*, 24 N. Y. Super. Ct. Rep. (1 Rob.) 711, 715, 19 Abb. Pr. 258. N. C.—*Howell v. Ferguson*, 87 N. C. 113. S. C.—*Smith v. Smith*, 50 S. C. 54, 27 S. E. 545; *Dent v. South Bend R. Co.*, 61 S. C. 329, 39 S. E. 527. FED.—*Timmons v. Fidelity & Casualty Co.*, 121 Fed. 934.

See, also, ante, §§ 728, 741; and *Pomeroy on Code Remedies and Remedial Rights*, §§ 551, 552.

³ *Colt v. Davis*, 50 Hun (N. Y.) 366, 16 N. Y. Civ. Proc. 180, 3 N. Y. Supp. 354.

See, also, ante, § 741.

⁴ *Scofield v. State Nat. Bank*, 9

Neb. 316, 31 Am. Rep. 412, 2 N. W. 888; *People v. McCumber*, 18 N. Y. 315, 72 Am. Dec. 515; *Faznacht v. Stehn*, 53 Barb. (N. Y.) 650, 5 Abb. Pr. N. S. 338; *Carpenter v. West*, 5 How. Pr. (N. Y.) 53, 55.

⁵ As to verification generally, see, ante, §§ 779 et seq.

⁶ See, among other cases: N. J.—*Anonymous*, 7 N. J. L. (2 Halst.) 160; *Cox v. Higbee*, 11 N. J. L. (6 Halst.) 395. N. Y.—*Tucker v. Ladd*, 4 Cow. 47; *Brewster v. Bostwick*, 6 Cow. 34; *Falls v. Stickney*, 2 Johns. 541; *Bowen v. Bissell*, 6 Wend. 511. ENG.—*Thomas v. Vandermoolen*, 2 Barn. & Ald. 197; *Shadwell v. Berthand*, 5 Barn. & Ald. 750; *Young v. Gadderer*, 1 Bing. 380; *Jones v. Studd*, 4 Bing. 663; *Balmanno v. Thompson*, 6 Bing. N. C. 153, 8 Dowl. 76; *Vincent v. Groome*, 1 Chit. 182; *Bones v. Bunter*, 1 Chit. 564a; *Pierce v. Blake*, 1 Salk. 515; *Hale v. Finch*, 2 Wils. 394.

⁷ *Werthelmer v. Morse*, 10 Ohio Dec. 814.

evidence to establish the fact that it is sham.⁸ Sham and irrelevant denials and answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose.⁹ Where the denial or answer is manifestly sham it may be stricken from the files, although the vice inheres in but a portion of the averments, and the answer contains other allegations by way of defense,¹⁰ because the whole of an entire answer must be struck out, or none;¹¹ and it requires but slight circumstances to prevent an answer from being stricken out.¹² Immaterial averments in a pleading need not be denied;¹³ and if it be done, both the complaint and answer,*so far as they relate thereto, will be disregarded when the sufficiency of the pleadings and issues are brought in question.¹⁴ Such was the rule in chancery.¹⁵ But a denial of immaterial circumstances may in some cases be treated as sufficient at the trial, if not previously objected to.¹⁶

⁸ *Metzger v. Metropolitan Elevated R. Co.*, 21 N. Y. Supp. 676; *Zivi v. Einstein*, 2 Misc. (N. Y.) 177, 23 N. Y. Civ. Proc. Rep. 56, 21 N. Y. Supp. 583, 676, reversing 1 Misc. 212, 20 N. Y. Supp. 893, 894.

⁹ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 453; *Frost v. Harford*, 40 Cal. 166; *Felch v. Beaudry*, 40 Cal. 444; *Davis v. Honey Lake Water Co.*, 98 Cal. 415, 417, 33 Pac. 270.

As to striking out answer as sham, see note 72 Am. Dec. 521-526.

Declaratory of power previously existing in the court, is the California section of the procedural code, and other like provisions.—See *Manufacturers' Bank v. Hitchcock*, 14 How. Pr. (N. Y.) 406.

¹⁰ *Sherman v. Boehm*, 13 Daly (N. Y.) 42, 15 Abb. N. C. 254, 7

N. Y. Civ. Proc. Rep. 34, 1 How. Pr. (N. S.) 278

¹¹ *Winslow v. Ferguson*, 1 Lans. (N. Y.) 136.

¹² *Munn v. Barnum*, 1 Abb. Pr. (N. Y.) 281, 12 How. Pr. 563; *Bell v. Ogden*, 13 Abb. Pr. (N. Y.) 93, 21 How. Pr. 442.

¹³ *Racouillat v. Rene*, 32 Cal. 450; *Toland v. Sprague*, 37 U. S. (12 Pet.) 300, 9 L. Ed. 1093.

¹⁴ *Jones v. Petaluma, City of*, 36 Cal. 230; *Doyl v. Franklin*, 48 Cal. 537, 539; *Fry v. Bennett*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 54, 1 N. Y. Code Rep. (N. S.) 238, 9 N. Y. Leg. Obs. 330.

¹⁵ *Wiswall v. Wendell*, 3 Barb. Ch. (N. Y.) 312; *Utica Ins. Co. v. Lynch*, 3 Pal. Ch. (N. Y.) 210.

¹⁶ *Wall v. Buffalo Water Works Co.*, 18 N. Y. 119.

§ 1088. — **MATTER OF COMPLAINT NOT WELL PLEADED.** In those cases in which there is matter in the complaint which is not well pleaded, it need not be denied, for if defendant merely denies what is nonessential in the averments of a complaint, it is an admission of all that is essential to a recovery,¹ and the denial of such averments is unnecessary.² Nonissuable matter need not be traversed.³ Hypothetical allegations in an answer are insufficient.⁴ But where, under the peculiar circumstances of the case, a payment could not be directly alleged, it might be stated in this way.⁵ So, in order to avoid the cause of action alleged, a defendant need not confess it; he may aver that if any such contract was made, it was made jointly with others.⁶ Averment of plaintiff's belief is not traversable.⁷ Allegations anticipating a defense need not be denied;⁸ and the same rule applies to the allegation of matters of evidence in the complaint.⁹ Persons who make contracts with a corporation can not deny its legal existence.¹⁰ And the general rule is that in those

¹ *Leffingwell v. Griffin*, 31 Cal. 231.

Examples of application of the rule, see *Landers v. Bolton*, 26 Cal. 393, 416; *Camden v. Mullen*, 29 Cal. 564.

² *Dovan v. Dinsmore*, 33 Barb. (N. Y.) 86, 20 How. Pr. 503; *Sands v. St. John*, 36 Barb. (N. Y.) 628, 23 How. Pr. 140; affirmed 4 Abb. Ct. App. Dec. 153; *Parshall v. Tillou*, 13 How. Pr. (N. Y.) 7; *Newman v. Otto*, 6 N. Y. Super. Ct. Rep. (4 Sandf.) 668; *Fry v. Bennett*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 54; *Simonton v. Winter*, 30 U. S. (5 Pet.) 140, 8 L. Ed. 75, reversing 3 Cr. C. C. 104, Fed. Cas. No. 17894; *Greathouse v. Dunlap*, 3 McL. 303, Fed. Cas. No. 5742; *Harbeck v. Craft*, 11 N. Y. Super. Ct. Rep. (4 Duer) 122.

³ *Edgerton v. Smith*, 10 N. Y. Super. Ct. Rep. (3 Duer) 614.

⁴ *Wies v. Fanning*, 9 How. Pr. (N. Y.) 543.

⁵ *Dovan v. Dinsmore*, 33 Barb. (N. Y.) 86, 20 How. Pr. 503; *Brown v. Ryckman*, 12 How. Pr. (N. Y.) 313.

⁶ *Taylor v. Richards*, 22 N. Y. Super. Ct. Rep. (9 Bosw.) 679.

⁷ *Patterson v. Caldwell*, 58 Ky. (1 Metc.) 492; *Walters v. Chinn*, 58 Ky. (1 Metc.) 502; *Radway v. Mather*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 654.

⁸ *Canfield v. Tobias*, 21 Cal. 349.

⁹ *Warmouth v. Hatch*, 33 Cal. 128.

¹⁰ *White v. Ross*, 4 Abb. Ct. App. Dec. (N. Y.) 589, 15 Abb. Pr. 66; *Park Bank v. Tilton*, 15 Abb. Pr. (N. Y.) 334; *Steam Navigation Co.*

cases in which credit given on an account in the complaint this is not a fact traversable in the answer.¹¹

§ 1089. — AMOUNT OF DAMAGES — DENYING. The amount of damages alleged in the complaint to have been sustained by the plaintiff need not be denied by the defendant;¹ thus, the amount of damages claimed when declaring on a breach of covenant need not be denied.² Where circumstances in aggravation of damages are alleged in the complaint they are not traversable.³ The same is true of allegations of special damages, unless of the gist of the action.⁴ In Indiana matters in mitigation of damages only, except in actions for libel and slander, can not be specially pleaded or set up in the answer, but should be given in evidence under the general denial.⁵ Allegations of matters of evidence in a pleading are not issuable facts. If the answer puts in issue the ultimate facts resulting from the evidence, it is a sufficient denial.⁶ Where plaintiffs' declaration averred that defendants promised to pay plaintiffs as "the heirs of C," a denial that plaintiffs were the heirs of C was held bad, as not denying any material allegation.⁷ Allegations of intention showing express malice are not issuable facts.⁸ The denial of time or place at which an act is alleged to have been done is frivolous, where time or place are not the

v. Weed, 17 Barb. (N. Y.) 378;
East River Bank v. Rogers, 20
N. Y. Super. Ct. Rep. (7 Bosw.)
494.

¹¹ Hodgins v. Hancock, 14 Mees.
& W. 120.

¹ Van Santv. Eq. Pl. 249.

² Hackett v. Richards, 3 E. D.
Smith (N. Y.) 134; reversed on
another point in 13 N. Y. 138; Ray-
mond v. Traffarn, 12 Abb. Pr.
(N. Y.) 52.

³ Bates v. Loomis, 5 Wend.
(N. Y.) 78; Gilbert v. Rounds, 14
How. Pr. (N. Y.) 46, 49; Schnader-

beck v. Worth, 8 Abb. Pr. (N. Y.)
37.

⁴ Molony v. Dows, 9 Abb. Pr.
(N. Y.) 86, 15 How. Pr. 265; Per-
ring v. Harris, 2 M. & Rob. N. P. 5.

⁵ Smith v. Lisher, 23 Ind. 500.

⁶ Moore v. Murdock, 26 Cal. 524;
Racoullat v. Rene, 32 Cal. 450.

⁷ Chandler v. Chandler, 21 Ark.
95.

⁸ Fry v. Bennett, 7 N. Y. Super.
Ct. Rep. (5 Sandf.) 54, 1 N. Y.
Code Rep. (N. S.) 238, 9 N. Y.
Leg. Obs. 330.

substance of the action.⁹ Value in detention of property should not be denied.¹⁰

§ 1090. — **EVASIVE DENIALS AND ANSWERS.** In the case of a verified answer, an evasion of the controlling fact in issue is a strong circumstance against the defendant.¹ In those cases in which a denial is clearly evasive, it will be insufficient to raise an issue.² In order to determine whether the denials of an answer are evasive, each separate denial of each separate allegation must be taken by itself. If the answer to a particular allegation is a denial of it, and there is no admission in the answer inconsistent with this denial, an issue is fairly made.³ In a case where a general denial may be interposed, if the pleader does not plead it, but resorts to specific denials, such specific denials must be actual denials, and not evasive.⁴ If a cause is tried upon the theory that the answer denies the allegation of the complaint, the plaintiff will not be permitted to raise the objection in the Supreme Court, that the answer is insufficient in this respect.⁵ An answer containing a different version of the transaction to that contained in the complaint is not a

⁹ *Castro v. Wetmore*, 16 Cal. 379; *Kuhland v. Sedgwick*, 17 Cal. 123; *Baker v. Bailey*, 16 Barb. (N. Y.) 54; *Salinger v. Lusk*, 7 How. Pr. (N. Y.) 430; *Davison v. Powell*, 16 How. Pr. (N. Y.) 467; *Livingston v. Hammer*, 20 N. Y. Super. Ct. Rep. (7 Bosw.) 670.

¹⁰ *Connors v. Meier*, 2 E. D. Smith (N. Y.) 314; *Woodruff v. Cook*, 25 Barb. (N. Y.) 505; *McKensie v. Farrell*, 17 N. Y. Super. Ct. Rep. (4 Bosw.) 193.

Compare: *Archer v. Boudinet*, 1 N. Y. Code Rep. (N. S.) 372, 373.

Denial on information and belief evasive of the issue tendered by the complaint when. — See *Humphreys v. McCall*, 9 Cal. 59,

70 Am. Dec. 621; *Brown v. Scott*, 25 Cal. 194; *Vassault v. Austin*, 32 Cal. 597; *Ketcham v. Zerega*, 1 E. D. Smith (N. Y.) 553, 554; *Kellogg v. Baker*, 15 Abb. Pr. (N. Y.) 286, 287; *Edwards v. Lent*, 8 How. Pr. (N. Y.) 28; *Taylor v. Luther*, 2 Sumn. 228, Fed. Cas. No. 13796.

¹ *Baker v. Baker*, 13 Cal. 87.

² *Lawrence v. Derby*, 15 Abb. Pr. (N. Y.) 346, note, 24 How. Pr. 133; *Beebe v. Marvin*, 17 Abb. Pr. (N. Y.) 194.

³ *Racouillat v. Rene*, 32 Cal. 450.

⁴ *Marsters v. Lash*, 61 Cal. 622.

⁵ *White v. San Rafael & S. Q. R. Co.*, 50 Cal. 417.

denial;⁶ as it does not specially controvert the allegations contained in the complaint.⁷ Where a defendant gives a different version of the matter in controversy, it should be accompanied by a specific denial of all the allegations of the complaint not consistent with the allegations in the answer.⁸ A denial manifestly inconsistent with statements of fact in other parts of the same pleading is bad.⁹ A mere denial of interest or ownership in the plaintiff will be insufficient where no statement of fact is made to sustain it.¹⁰ Where a negative allegation is necessary in stating the cause of action, although it must, of course, precede an averment by the opposite party of the fact negated, it nevertheless constitutes the basis of the issue joined by the subsequent averment, and the latter operates as a traverse, and not as an averment of new matter;¹¹ thus, a plea of payment, in an action upon a promissory note, operates as a traverse and not as an averment of new matter,¹² the fact that the allegation is affirmative does not determine its character;¹³ and in an action on account, a denial that the amount is due, and setting up that the purchase was made upon an unexpired credit, constitutes a denial only.¹⁴ A denial which argumentatively disputes a fact averred in the complaint,

⁶ *West v. American Exch. Bank*, 44 Barb. (N. Y.) 175, 176.

⁷ *Levy v. Bend*, 1 E. D. Smith (N. Y.) 169; *Corwin v. Corwin*, 9 Barb. (N. Y.) 219; reversed on another point in 6 N. Y. 342, 57 Am. Dec. 453; *Wood v. Whiting*, 21 Barb. (N. Y.) 190; *Hamilton v. Hough*, 13 How. Pr. (N. Y.) 14; *Loosey v. Orser*, 17 N. Y. Super. Ct. Rep. (4 Bosw.) 392.

Different version of transaction as implying a denial of plaintiff's right to relief.—*Peck v. Brown*, 25 N. Y. Super. Ct. Rep. (2 Rob.) 119, 26 How. Pr. 350.

⁸ See *Dykers v. Woodward*, 7 How. Pr. (N. Y.) 313.

⁹ *Livingston v. Harrison*, 2 E. D. Smith (N. Y.) 197.

¹⁰ *Russell v. Clapp*, 3 N. Y. Code Rep. 64, 7 Barb. (N. Y.) 482, 4 How. Pr. 347.

¹¹ *Frisch v. Caler*, 21 Cal. 71.

¹² *Id.* See *Fairchild v. Ambaugh*, 22 Cal. 575; *Mauldin v. Ball*, 5 Mont. 96, 99, 1 Pac. 409.

¹³ *Goddard v. Fulton*, 21 Cal. 435; *Scott v. Wood*, 81 Cal. 398, 404, 22 Pac. 871.

¹⁴ *Schecter v. White*, 41 Colo. 219, 220, 92 Pac. 700.

is demurrable, as the traverse must be direct.¹⁵ Denials must not be in the alternative, because such denials are defective in form, and leave it uncertain what is denied.¹⁶ A party may not controvert a declaration he has made by deed.¹⁷ Under the provisions of the California procedural code,¹⁸ denials contained in an answer, which do not explicitly traverse the material allegations of the complaint, may be stricken out on motion as sham and irrelevant;¹⁹ yet, if the plaintiff, without objecting to such denials, introduces evidence in support of the averments in the complaint, all objections to the sufficiency of the denials are thereby waived;²⁰ this rule, however, does not apply to facts alleged in the complaint which the answer, by its silence, has admitted to be true, and upon which there was no attempt to join issue.²¹ Although a general denial of the allegations of the complaint may, if falsely pleaded, be characterized as sham, yet an inquiry in advance of the trial can not be entertained by the court as to the good faith of the defendant in pleading it, nor can it be stricken out as a sham on the application of the plaintiff.²² In an action for the breach of a contract to clear certain land

¹⁵ *Frisbee v. Lindley*, 23 Ind. 511; *Gallagher v. Dunlap*, 2 Nev. 326; *Mower v. Burdick*, 4 McL. 7, Fed. Cas. No. 9890.

¹⁶ *Corbin v. George*, 2 Abb. Pr. (N. Y.) 467; *Otis v. Ross*, 8 How. Pr. (N. Y.) 193, 11 N. Y. Leg. Obs. 343.

¹⁷ *Tartar v. Hall*, 3 Cal. 263; *United States v. Thompson*, 1 Gall. 388, Fed. Cas. No. 16486.

¹⁸ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 453.

¹⁹ *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152.

²⁰ *Id.*; *Tuffree v. Polhemus*, 108 Cal. 676, 41 Pac. 806; *Kimball v. Richardson*, 111 Cal. 397, 43 Pac. 1111.

²¹ *Reclamation Dist. v. Hershey*, 160 Cal. 692, 117 Pac. 904.

²² CAL.—*Fay v. Cobb*, 51 Cal. 313, 315; *Greenbaum v. Turrill*, 57 Cal. 287. DAK.—*Cupples Wooden Ware Co., Samuel, v. Jensen*, 4 Dak. 149, 151, 27 N. W. 206, 28 N. W. 193. KAN.—*Bartholomew, In re*, 41 Kan. 273, 276, 21 Pac. 275. S. D.—*Green v. Hughitt School Township*, 5 S. D. 452, 456, 59 N. W. 224 (although there is a general denial and inconsistent special denials); *Loranger v. Big Missouri Min. Co.*, 6 S. D. 478, 61 N. W. 686; *King v. Waite*, 10 S. D. 1, 5, 70 N. W. 1056 (although denied by an affidavit subsequently filed). WASH.—*Larsen v. Winder*, 14 Wash. 647, 45 Pac. 315.

of standing timber so as to fit it for seeding, an answer which admits the contract, but denies a breach thereof, and shows affirmatively that the defendants were proceeding with due performance thereof according to its terms until requested by the plaintiffs to desist from so doing, can not be said to be either sham, frivolous, or immaterial.²³ Where an answer shadows forth a good defense, but states it imperfectly, the defect should be met by a motion calling for an amendment curing such defect, and not by motion for judgment on the answer as frivolous.²⁴ A frivolous answer is one so clearly and palpably bad as to require no argument or illustration to show its character, and which would be pronounced frivolous and indicative of bad faith in the pleader upon a bare inspection.²⁵ A general denial of the material allegations of a complaint can not be stricken out on the ground that it is sham or frivolous pleading.²⁶ And an answer containing an absolute and unqualified denial of one or more material allegations of the complaint is not demurrable as not stating facts sufficient to constitute a defense.²⁷

§ 1091. ADMISSIONS IN ANSWER—EFFECT OF. Admissions in an answer are conclusive as against the defendant as to the matters or facts admitted,¹ no proof is required as to the facts thus admitted;² and it has been said that an answer containing admissions, though superseded by

²³ *Brown v. Porter*, 7 Wash. 327, 34 Pac. 1105.

²⁴ *Yerkes v. Crum*, 2 N. D. 72, 49 N. W. 422.

²⁵ *Strong v. Sproul*, 53 N. Y. 499, reversing 4 Daly 326; *Bank of Commerce v. Humphrey*, 6 S. D. 415, 61 N. W. 444; *Cottrill v. Cramer*, 40 Wis. 555.

²⁶ *State ex rel. Gunderson v. King*, 6 S. D. 297, 60 N. W. 75; *Larsen v. Winder*, 14 Wash. 647, 45 Pac. 315.

²⁷ *Hill v. Walsh*, 6 S. D. 421, 61 N. W. 440.

¹ *Blankman v. Vallejo*, 15 Cal. 638; *Fremont v. Seals*, 18 Cal. 433; *Wyles v. Berry*, 116 Ky. 377, 380, 76 S. W. 726.

As to curing defects in complaint by answer, see, ante, § 876.

² *Patterson v. Ely*, 19 Cal. 28; *Teller v. Hartman*, 16 Colo. 447, 27 Pac. 947; *Denver, City of, v. Soloman*, 2 Colo. App. 534, 31 Pac. 507; *Putnam v. Lyon*, 3 Colo. App.

an amended answer, is admissible in evidence against the defendant.³ An admission in an answer is not avoided by a special averment of immaterial matter.⁴ If the answer contains several defenses stated separately, an admission made in one answer, for the purpose of pleading a separate defense, does not destroy the effect of a denial of the matter thus admitted in another answer.⁵

*In California,*⁶ *Colorado,*⁷ *Idaho,*⁸ and perhaps elsewhere, when a defense is founded on a written instrument, and a copy is contained in the answer or annexed thereto, the genuineness and due execution will be deemed admitted, unless the plaintiff, within ten days after service of the answer, file with the clerk and serve upon the defendant an affidavit denying the same; but not by a failure to controvert the same on oath, unless the plaintiff be permitted to inspect the original. The rule in some of the states is, that an explicit admission of a fact alleged in the complaint, in any defense, may be used by the plaintiff to sustain the allegations of the complaint, and when a fact is so admitted the plaintiff is relieved from proving such fact on the trial;⁹ but an opposite view is taken in California.¹⁰

144, 32 Pac. 492; *Burke v. McDonald*, 2 Idaho (West Pub. Co. ed.) 646, 33 Pac. 49.

³ *Wyles v. Berry*, 116 Ky. 377, 380, 76 S. W. 126.

⁴ *Reed v. Calderwood*, 32 Cal. 109.

⁵ *Siter v. Jewett*, 33 Cal. 92; *Swift v. Kingsley*, 24 Barb. (N. Y.) 541.

⁶ *Kerr's Cyc. Cal. Code Civ. Proc.*, §§ 448, 449.

⁷ *Colo. Code*, § 62; *School Dist. v. McComb*, 18 Colo. 240, 32 Pac. 424.

⁸ *United States v. Alexander*, 2 Idaho (West Pub. Co. ed.) 354, 17 Pac. 746.

⁹ *Paige v. Willet*, 38 N. Y. 28, 5 Trans. App. 27; *McLaughlin v. Alexander*, 2 S. D. 226, 49 N. W. 99; *Seattle Nat. Bank v. Jones*, 13 Wash. 281, 48 L. R. A. 177, 43 Pac. 331; *Dickson v. Cole*, 34 Wis. 621.

As to inconsistent defenses and the effect thereof, see, ante, §§ 1049, 1050.

¹⁰ See *Amador County*, 51 Cal. 526; *McDonald v. Southern Cal. R. Co.*, 101 Cal. 206, 35 Pac. 643, 646. See *Glenn v. Sumner*, 132 U. S. 152, 33 L. Ed. 301, 10 Sup. Ct. Rep. 41.

California doctrine discussed, and authorities cited, ante, §§ 1049, 1050.

*A plea which admits execution of the instrument, and sets up matter in avoidance, is not objectionable as amounting to the general issue.*¹¹ Where the answer avers that defendant has in all respects faithfully kept the terms and complied with the conditions of the contract, but does not specifically deny the breaches set out in the complaint, if not demurred to, the plaintiff can not claim that the allegations charging certain breaches are admitted.¹² Proceedings which are void, by reason of the infirmity of the statute under which they are had, are not cured by an averment in a complaint that they were duly and legally had; and a failure to deny the averment in the answer is not an admission that the proceedings were valid or legal.¹³ An admission by an attorney of record of the correctness of an amount due, for which judgment is taken, when not done in fraud of the rights of his client, destroys the effect of a denial in an answer.¹⁴ And if a defendant in his answer admits a material allegation of the complaint, he is precluded from afterwards contesting it.¹⁵

§ 1092. ANSWER NOT EVIDENCE FOR DEFENDANT. We have already seen that the admission in an answer of an issuable fact well stated in the complaint, is conclusive evidence, on that point, for the plaintiff;¹ but, under the pro-

¹¹ Thomas v. Page, 3 McL. 167, Fed. Cas. No. 13906.

¹² Toler v. Cool, 37 Mo. 85.

¹³ People v. Hastings, 29 Cal. 449.

¹⁴ Taylor v. Randall, 5 Cal. 79; Sampson v. Ohleyer, 22 Cal. 210.

Remedy of client, in such a case, is to proceed against his attorney. —Sampson v. Ohleyer, 22 Cal. 210.

¹⁵ Spanagel v. Reay, 47 Cal. 608; Howard v. Throckmorton, 48 Cal. 482; Palmer v. Utah & N. R. Co., 2 Idaho (West Pub. Co. ed.)

350, 352, 16 Pac. 553. See Page v. Williams, 54 Cal. 562; Harney v. Corcoran, 60 Cal. 314; Edgar v. Stevenson, 70 Cal. 286, 11 Pac. 704; Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Dorn v. Baker, 96 Cal. 206, 31 Pac. 37; Siskiyou County v. Gamlich, 110 Cal. 94, 42 Pac. 468; Pacific Rolling Mill Co. v. Bear Valley Irr. Co., 120 Cal. 94, 65 Am. St. Rep. 158, 52 Pac. 136; Bank of Woodland v. Heron, 122 Cal. 107; 54 Pac. 537.

¹ See, ante, § 1091, footnote 1.

cedural codes, the answer is never evidence for the defendant; it stands on the same footing as any other self-serving declaration.² Thus, even in equity, an answer responsive to and denying the complaint or bill in equity, is not evidence for the defendant;³ but the rule was otherwise under the former and common-law rule of judicature, and an answer in equity, where responsive to the plaintiff's pleading, was taken as true, unless denied by two credible witnesses, or by one such witness who was corroborated by circumstances.⁴ In those cases in which the answer was not responsive to the plaintiff's pleading, it was not taken as true, was not evidence of the facts alleged, and must be proved on the trial.⁵ Omission to plead a defense specially is not cured by the introduction of evidence, without objection, to support it.⁶ This matter has already been fully discussed.⁷

² *Blankman v. Vallejo*, 15 Cal. 638; *Sweitzer v. Claffin*, 74 Tex. 667, 12 S. W. 395.

³ *Goodwin v. Hammond*, 13 Cal. 168, 73 Am. Dec. 574; *Bostick v. Love*, 16 Cal. 69.

⁴ GA.—*Zeigler v. Scott*, 10 Ga. 389, 54 Am. Dec. 395. MD.—*Price v. McDonald*, 1 Md. 403, 54 Am. Dec. 657; *Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375. N. H.—*Miles v. Miles*, 32 N. H. 147, 64 Am. Dec. 362; *Busby v. Littlefield*, 33 N. H. 76; *Johnson v. Richardson*, 38 N. H. 353; *Wood v. Griffin*, 46 N. H. 230. N. J.—*Belford v.*

Crane, 16 N. J. Eq. (1 C. E. Gr.) 265, 84 Am. Dec. 155. PA.—*Commonwealth ex rel. Claghorn v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450.

As to answers in equity as evidence, see notes 53 Am. Dec. 473, 54 Am. Dec. 400.

⁵ *Commonwealth ex rel. Claghorn v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450.

⁶ *Smith v. Owens*, 21 Cal. 11; *McComb v. Reed*, 28 Cal. 281, 87 Am. Dec. 115.

⁷ As to effect of omission to plead defenses, see, ante, § 1051.

CHAPTER IX.

ANSWER (CONTINUED)—PLEAS: GENERAL AND SPECIAL.

- § 1093. In general.
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§ 1093. IN GENERAL. Under the California procedural code, and under other procedural codes, pleas, by that designation or name, are unknown; but they are still available to the defendant, where pleaded in the proper form under the code provision. The only pleadings on the part of the defendant, under the procedural codes, are demurrer and answer, the latter including counter-claims and sets-off.¹ In equitable cases, prior to the procedural codes, a plea was but a special answer, showing or relying upon one or more things as a cause why the suit should be either dismissed, or delayed, or barred. At law, it was the defendant's answer, by matter of fact, to the plaintiff's declaration. Under the procedural codes, the defendant's pleading, while performing any or all these several offices, is known only as an answer. A respondent is not bound to reserve, for a final hearing, any matter which amounts to a bar of the relief prayed, but he may, if it be the subject for a plea, put it into that shape, in order to save the expense of going into a general examination.² It is a general rule that a plea ought not to contain more defenses than one. Various facts can never be pleaded in one plea, unless they are all conducive to

¹ As to counter-claims and sets-off, see, post, §§ 1178-1188.

² *Wilson v. Graham*, 4 Wash. C. C. 53, Fed. Cas. No. 17804.

the single point on which the defendant means to rest his defense;³ and in equity a plea, which if allowed, shuts out the merit of the case, will not be allowed to stand as a plea.⁴ A plea professing to answer the whole complaint, but which answers only a part, is bad on demurrer;⁵ thus, where the complaint is in two counts, and the plea responds to the first count only, the plaintiff is entitled to judgment on the second count as by default.⁶

³ *Rhode Island v. Massachusetts*, 39 U. S. (14 Pet.) 210, 10 L. Ed. 423.

⁴ *Id.*; *Greene v. Harris*, 11 R. I. 29; *Dietrich v. Leavitt*, 81 Vt. 167, 69 Atl. 663; *Ainger v. Webster*, 85 Vt. 451, 82 Atl. 668; *Matthews v. Lalance & Grosjean Mfg. Co.*, 18 Blatchf. 87, 2 Fed. 234; *Chisholm v. Johnson*, 84 Fed. 386; *Glucose Sugar Refining Co. v. Douglass*, 145 Fed. 949, 951.

Discretion of court called for, it is error for court to rule upon the plea pro forma.—*Ainger v. Webster*, 85 Vt. 451, 82 Atl. 668.

May be stricken out or set down as an answer.—*Newton v. Thayer*, 34 Mass. (17 Pick.) 129; *Rhode Island v. Massachusetts*, 39 U. S. (14 Pet.) 210, 10 L. Ed. 423; *Sharp v. Ressler*, 9 Fed. 445; *Glucose Sugar Refining Co. v. Douglass*, 145 Fed. 949, 951.

⁵ ALA.—*Wittick v. Traun*, 27 Ala. 562, 62 Am. Dec. 778. CAL.—*Wallace v. Bear River Water & Min. Co.*, 18 Cal. 461. FLA.—*Ferrall v. Bradford*, 2 Fla. 508, 50 Am. Dec. 293. ILL.—*Goodrich v. Reynolds*, 31 Ill. 490, 83 Am. Dec. 240; *People v. McCormack*, 68 Ill. 230; *Dickerson v. Hendryx*, 88 Ill. 68. IND.—*Feaster v. Woodfill*, 23 Ind. 493. MO.—*Weimer v. Shelton*, 7

Mo. 237. N. H.—*Leslie v. Harlow*, 18 N. H. 518. N. Y.—*Root v. Woodruff*, 6 Hill 420; *Hickok v. Coates*, 2 Wend. 419, 20 Am. Dec. 632; *Slocum v. Despard*, 8 Wend. 617; *Ethridge v. Osborn*, 12 Wend. 402; *Loder v. Phelps*, 13 Wend. 48; *Underwood v. Campbell*, 13 Wend. 80; *Phelps v. Sowles*, 19 Wend. 549; *Herkimer v. Small*, 21 Wend. 277. WIS.—*Fitzsimmons v. City Fire Ins. Co. of New Haven*, 18 Wis. 234, 86 Am. Dec. 761. FED.—*Hogan v. Ross*, use of *Patterson*, 54 U. S. (13 How.) 173, 14 L. Ed. 100.

See 1 Chitty on Pleading (16th Am. ed.), 549.

Plea bad in part is bad in toto.—*Wittick v. Traun*, 27 Ala. 562, 62 Am. Dec. 778; *Ferrall v. Bradford*, 2 Fla. 508, 50 Am. Dec. 293.

—In Texas, by statute, under a plea of total failure of consideration, defendant may show a partial failure of consideration.—*Brantly v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264.

⁶ *Dwight v. Holbrook*, 83 Mass. (1 Allen) 560; *Hogan v. Ross*, use of *Patterson*, 54 U. S. (13 How.) 173, 14 L. Ed. 100; *Aurora, City of, v. West*, 74 U. S. (7 Wall.) 91, 19 L. Ed. 46; *Chapman v. Barney*, 129 U. S. 681, 32 L. Ed. 801, 9 Sup. Ct. Rep. 427.

A defendant can not in different counts deny the same facts in different language, or make only a partial defense to a whole cause of action, or set out matter in avoidance, without confessing that which he attempts to avoid.⁷ A plea is defective when its averments, if admitted to be true, would not constitute a defense to the action.⁸ The plea should be direct in stating with sufficient precision the matter of defense, and not leave it to be found out by inference, however strong.⁹ But material facts inferentially stated are good after judgment, if no demurrer has been interposed specially for that reason.¹⁰ Matters of inducement in a plea should be an answer to the opposite party's allegations; the traverse is but an inference from the inducement.¹¹ A plea which might be objectionable on the ground of want of sufficient certainty can not be treated as a nullity by the court, unless its sufficiency is excepted to.¹²

Allegations of a defense pertinent to controversy, their sufficiency is only to be tested by demurrer, or on the trial.¹³ But in New York it has been held, an answer merely defensive which does not set up a counter-claim is not demurrable.¹⁴ Where a party sets up matter in his answer not recognized by law as a defense to the action, while the objection may be taken by demurrer, it is not waived by failure to demur, but may be taken advantage of at any time.¹⁵ The defense, that the defendant acted by

⁷ *Martin v. Swearingen*, 17 Iowa 346.

⁸ *White v. How*, 3 McL. 291, Fed. Cas. No. 17549; *Smith v. Ely*, 5 McL. 76, Fed. Cas. No. 13043.

⁹ *Brooks v. Byam*, 1 Story 296, Fed. Cas. No. 1947; *Savoy v. Goe*, 3 Wash. C. C. 140, Fed. Cas. No. 12388.

¹⁰ See *Hill v. Haskin*, 51 Cal. 175; *Wells, Fargo & Co. v. McCarthy*, 5 Cal. App. 311, 90 Pac. 207; *Dillon v. Cross*, 5 Cal. App.

768, 91 Pac. 440; *Nevin v. Gary*, 12 Cal. App. 5, 106 Pac. 423.

¹¹ *Egberts v. Dibble*, 3 McL. 86, Fed. Cas. No. 4307.

¹² *Cunningham v. Wheatly*, 21 Tex. 184.

¹³ *Carpenter v. Bell*, 24 N. Y. Super. Ct. Rep. (1 Rob.) 711, 19 Abb. Pr. (N. Y.) 258.

¹⁴ *Relay v. Thomas*, 11 How. Pr. (N. Y.) 226.

¹⁵ *Macdougall v. Maguire*, 35 Cal. 274, 95 Am. Dec. 98; *Marriott*

advice of counsel, must show that such advice was given upon a full and fair statement of the facts.¹⁶

Issues of law and issues of fact are to be separately pleaded. It has been held in New York to be improper to set up in an answer that the complaint does not contain facts sufficient to constitute a cause of action.¹⁷ The California procedural code, as amended in 1907,¹⁸ especially provides that "the defendant may demur and answer at the same time," but this is not thought to authorize a defendant to demur in his answer,—that is, by his answer raise both issues of law and issues of fact,—but simply authorizes the defendant, at the same time, to demur as to a part and to answer as to a part of the complaint, and that, because of this statutory provision, the filing of the answer to a part of the complaint will not constitute a waiver of the objection taken by the demurrer to another part of the complaint. As a matter of good pleading, and according to the few cases there are upon the subject in that state, the issues of law and of fact should not be united in the answer,¹⁹ even when the part of the answer taking exception to the sufficiency of a portion of the complaint is separately stated and in its form duly conforms to the requirement of the statute regulating demurrers; for, as has been well said, "no court could prop-

v. Clise, 12 Colo. 561, 564, 21 Pac. 909; Green v. Underwood, 86 Fed. 432.

¹⁶ Bliss v. Wyman, 7 Cal. 257; Ross v. Innis, 35 Ill. 507, 85 Am. Dec. 376; Scott v. Longfellow, 40 Ind. 30; Cooper v. Utterbach, 37 Md. 309; Smith v. Davis, 3 Mont. 109, 111.

Facts fully and fairly stated to prosecuting attorney, under whose advice criminal proceedings instituted and prosecuted, is not liable in an action for malicious prosecution, where the prosecution on a criminal charge fails because the

acts complained of did not constitute a crime.—Van Meter v. Bass, 40 Colo. 78, 18 L. R. A. (N. S.) 49, 90 Pac. 637.

As to advice of counsel as a defense in action for malicious prosecution, see note 18 L. R. A. (N. S.) 49-74.

¹⁷ See Slack v. Heath, 4 E. D. Smith (N. Y.) 95, 1 Abb. Pr. 331.

¹⁸ Kerr's Cyc. Cal. Code Civ. Proc., 2nd ed., § 431; Consolidated Supp. 1906-1913, p. 1455.

¹⁹ Brooks v. Douglass, 32 Cal. 208, 212.

erly sustain such pleading, or uphold a kind of hybrid answer, half demurrer and half plea," especially where not separately stated, and there is nothing to distinguish where the one leaves off and the other commences.²⁰ The demurrer should be filed as a separate pleading,²¹ and the issues of law disposed of before the issues of fact are considered. Where the issues of law and the issues of fact are raised in the same pleading, on appeal it will be presumed that the issues of law were first disposed of.²²

§ 1094. PLEAS IN ABATEMENT. A plea or an answer setting up matter in abatement is with the purpose of defeating the present action;¹ but a plea in bar² goes to the merits, and admits that plaintiff once had a right of action, but insists that it is determined;³ and an answer in abatement, when taken with a plea in bar, can not be made available.⁴ But under the New York code a plea in abatement is properly joined in the same answer with a defense in bar.⁵ It is a bad mode of pleading to unite pleas in abatement and pleas to the merits, and if, after pleas in abatement, a defense be interposed going to the merits of the controversy, the grounds alleged in abatement become thereby immaterial, and are waived.⁶ Where

²⁰ *Andrews v. Mokelumne Hill Co.*, 7 Cal. 330, 334.

²¹ *Brooks v. Douglass*, 32 Cal. 208, 212.

²² *Id.*; *Smith v. Clyne*, 16 Idaho 466, 470, 101 Pac. 819.

¹ 1 Chitty on Pleading (16th Am. ed.), p. 462.

² See, post, § 1096.

³ 1 Chitty on Pleading (16th Am. ed.), p. 547.

⁴ *Watts v. Sweeney*, 127 Ind. 116, 22 Am. St. Rep. 615, 26 N. E. 680; *Spencer v. Lapsley*, 61 U. S. (20 How.) 264, 15 L. Ed. 902.

See cases cited in 5 Rose's Notes to U. S. Reps. (2nd ed.), p. 51.

¹ Code Pl. and Pr.—§2

⁵ *Sweet v. Tuttle*, 14 N. Y. 465, affirming 10 How. Pr. 40; *Gardner v. Clark*, 21 N. Y. 399.

In Oregon defendant in eminent domain proceeding, may join with a plea in abatement of the proceeding a claim for damages.—*Bridal Veil Lumber Co. v. Johnson*, 25 Ore. 105, 34 Pac. 1026.

⁶ See: KY.—*Newport News & M. V. R. Co. v. Thomas*, 96 Ky. 613, 615, 29 S. W. 437. MD.—*Tyler v. Murry*, 57 Md. 438; *O'Brien v. State*, 126 Md. 270, 282, 94 Atl. 1039. WIS.—*Dutcher v. Dutcher*, 39 Wis. 662. FED.—*Sheppard v. Graves*, 55 U. S. (14 How.) 505, 14 L. Ed. 518; *Dred Scott v. Sanford*,

there is a plea to the merits, and issue joined thereon, and the parties go to trial accordingly, irregularities previously set up by pleas in abatement and demurrers to them are waived.⁷ Under the California procedural code⁸ the defendant is permitted to set forth in his answer as many defenses as he may have. If certain matters, as another action pending, appear on the face of the complaint, the objection may be taken by demurrer; but if it does not so appear, it may be taken by answer. Matters in abatement are then proper in an answer, and may be pleaded with other defenses. Matter in abatement which merely defeats the present proceeding must be specially set up in the answer or they will be deemed waived,⁹ and must be pleaded, with such particularity as to exclude every conclusion to the contrary.¹⁰ Such pleas are not favored. The party pleading them relies on technical law

60 U. S. (19 How.) 519, 15 L. Ed. 748; *Spencer v. Lapsley*, 61 U. S. 20 How.) 267, 15 L. Ed. 904; *De Sobry v. Nicholson*, 70 U. S. (3 Wall.) 423, 18 L. Ed. 264; *Steigleder v. McQuesten*, 198 U. S. 142, 49 L. Ed. 987, 25 Sup. Ct. Rep. 616; *Davies v. Lathrop*, 21 Blatchf. 165, 13 Fed. 566; *Fenwick v. Grimes*, 7 Cr. C. C. 603, Fed. Cas. No. 4734; *Blackburn v. Selma, M. & M. R. Co.*, 2 Flp. 525, 533, Fed. Cas. No. 1467; *Butchers' & Drovers' Stock-Yards Co. v. Louisville & N. R. Co.*, 14 C. C. A. 290, 67 Fed. 40; *Lehigh Valley Coal Co. v. Yensavage*, 134 C. C. A. 275, 218 Fed. 566; *Charlotte v. Atlantic Bituminous Co.*, 228 Fed. 464.

Conformity Act of 1901 changes the rule theretofore prevailing in federal courts, and defendant can raise question of jurisdiction on a general denial, and is not required to especially plead in abatement.

—*Cole v. Carson*, 28 C. C. A. 408, 153 Fed. 279.

⁷ *Bell v. Mobile & O. R. Co.*, 71 U. S. (4 Wall.) 598, 18 L. Ed. 338; *Stanton v. Embry*, 93 U. S. 553, 23 L. Ed. 985. See *Robinson v. Hart-ridge*, 13 Fla. 507; *Fisher v. Scholte*, 30 Iowa 222; *Pottinger v. Garrison*, 3 Neb. 223; *State v. Chadwick*, 10 Ore. 427; *Young v. Martin*, 3 Utah 486, 24 Pac. 910.

⁸ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 441.

⁹ *Tooms v. Randall*, 3 Cal. 438, 440; *Greenfield v. Gunnell*, 6 Cal. 68; *Pearks v. Freer*, 9 Cal. 643; *Cook v. Pendergast*, 61 Cal. 75; *Ontario State Bank v. Tibbits*, 80 Cal. 68, 70, 22 Pac. 66; *California Sav. & L. Soc. v. Harris*, 111 Cal. 133, 136, 43 Pac. 525; *Reed v. Harshall*, 12 Cal. App. 704, 108 Pac. 722; *Riverdale Min. Co. v. Wicks*, 14 Cal. App. 532, 112 Pac. 898.

¹⁰ *Tooms v. Randall*, 3 Cal. 438; *Hentsch v. Porter*, 10 Cal. 555.

to defeat the plaintiff's action, and is held to "technical exactness in his pleading."¹¹

§ 1095. PLEAS IN AVOIDANCE. The cases are so numerous where defendant should specially plead matters in avoidance or estoppel, that it is scarcely possible to make more than a reference to those coming under this general proposition. Matters in avoidance must be specially pleaded; they can not be used as defenses, under an answer which is a simple denial of the allegations.¹ A further answer by way of confession and avoidance of the matters alleged in a complaint is inconsistent with a specific denial thereof, but may properly be pleaded with a special or qualified denial, such as a denial with an *absque hoc*.² Under the California procedural code,³ the statement of any new matter in an answer, in avoidance or constituting a defense or counter-claim, is deemed upon the trial to be controverted by the opposite party, and any proper evidence is admissible to meet and overcome such defense.⁴

Matter of avoidance arising since suit brought, but pleaded at the first term at which the defendant appears, need not be pleaded puis darrein continuance.⁵ Such a plea must have the same certainty as to time and place as other pleas, and if it does not allege the day on which the matter pleaded happens, it is bad.⁶ The plaintiff and defendant respectively may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint

¹¹ CAL.—Thompson v. Lyon, 14 Cal. 42; Larco v. Clements, 30 Cal. 132. COLO.—Craig v. Smith, 10 Colo. 220, 15 Pac. 337. FLA.—Jenkins v. State, 35 Fla. 737, 48 Am. St. Rep. 267, 18 So. 182. MICH.—East v. Cain, 49 Mich. 473. R. I.—Capewell v. Sipe, 17 R. I. 475, 33 Am. St. Rep. 890, 23 Atl. 14. FED.—Anonymous, 1 Hempst. 215, Fed. Cas. No. 18224.

¹ Gaskill v. Moore, 4 Cal. 233.

² McDonald v. American Mortgage Co., 17 Ore. 626, 21 Pac. 883.

³ Kerr's Cyc. Cal. Code Civ. Proc., § 462.

⁴ Williams v. Dennison, 94 Cal. 540, 29 Pac. 946; Sterling v. Smith, 97 Cal. 343, 32 Pac. 320.

⁵ Cutter v. Folsom, 17 N. H. 139.

⁶ Cummings v. Smith, 50 Me. 568, 79 Am. Dec. 629.

or answer.⁷ A plea puis darrein continuance is a relinquishment of all preceding pleas,⁸ and its allowance is in the discretion of the court.⁹ When this plea is adjudged bad on demurrer, judgment is final against the defendant.¹⁰

§ 1096. PLEAS IN BAR. In those cases in which the subject-matter of the plea or defense is that the plaintiff can not maintain any action at any time, whether present or future, in respect of the supposed cause of action, it may and usually must be pleaded in bar, and must be specially set up; but matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should in general be pleaded in abatement.¹ Where a plea in answer is but notice of special matter by way of abatement, and goes to but part of the cause of action, it can not be relied on as a plea in bar.² It is not a sufficient objection to the plea that it avers that the obligation was obtained from him by fraudulent representations, or that it concludes with a general prayer for judgment. Pleas in bar are not to receive a narrow and merely technical construction, but are to be construed according to their entire subject-matter. In this respect there is a difference between pleas in bar and pleas in abatement.³ Upon a hearing on an issue on a plea in bar

⁷ Kerr's Cyc. Cal. Code Civ. Proc., § 464.

⁸ Tanner v. Roberts, 1 Mo. 416; Lincoln v. Thrall, 26 Vt. 305; Yeaton v. Lynn, use of Lyles, 30 U. S. (5 Pet.) 224, 8 L. Ed. 105; Wallace v. Connell, 38 U. S. (13 Pet.) 136, 10 L. Ed. 95; Good v. Davis, 1 Hempst. 16, Fed. Cas. No. 5530a; Wisdom v. Williams, 1 Hempst. 460, Fed. Cas. No. 17904; Spafford v. Woodruff, 2 McL. 191, Fed. Cas. No. 13198.

As to nature and effect of this

plea, see Mount v. Scholes, 120 Ill. 394, 11 N. E. 401.

⁹ Nettles v. Sweazea, 2 Mo. 100; Thomas v. Van Doren, 6 Mo. 201.

¹⁰ McKeen v. Parker, 51 Me. 389.

¹ Hentsch v. Porter, 10 Cal. 555.

² Leslie v. Harlow, 18 N. H. 518; Fitzsimmons v. City Fire Ins. Co. of New Haven, 18 Wis. 234, 36 Am. Dec. 761; United States v. Dashiell, 71 U. S. (4 Wall.) 182, 18 L. Ed. 319.

³ Withers v. Greene, 50 U. S. (9 How.) 213, 13 L. Ed. 109.

to a bill in chancery, no question arises as to the sufficiency of the plea in point of law; it is only necessary to be proved in point of fact.⁴ Pleas in bar which seek to avoid the equity of the case are not to be favored.⁵ An answer setting up in bar to a whole cause of action a matter which constitutes a bar to only a part of it is bad.⁶ Where there are several items in a plea in bar, there must be enough items in the whole, each one well pleaded, to meet the whole of the demand.⁷ An error in the prayer for judgment in a plea in bar will not prevent the rendition of the judgment appropriate to the substance of the plea, confessed by general demurrer.⁸ A plea to a bill in equity may be good in part, and not so in the whole; and the court will allow it as to so much of the bill as it is properly applicable, unless it has the vice of duplicity in it.⁹ So if any one of several pleas, going to the whole merits of the case, is well pleaded, and contains a full and sufficient answer, it will entitle the defendant to judgment.¹⁰ A promise to forbear to sue for a definite time, where the promise is based upon a sufficient consideration, may be pleaded in bar to an action.¹¹

§ 1097. SPECIAL PLEAS—AS TO EFFECT OF. A plea to the merits is a waiver of all pleas in abatement subsequent to

⁴ Hughes v. Blake, 1 Mas. 515, Fed. Cas. No. 6845.

⁵ See Piatt v. Oliver, 1 McL. 295, Fed. Cas. No. 11114.

⁶ Id.; McClintic's Adm'r v. Cary, 22 Ind. 170; Richardson v. Hickman, 22 Ind. 244; Peyatte v. English, 1 Hempst. 24, Fed. Cas. No. 11054a; Parker v. Lewis, 1 Hempst. 72, Fed. Cas. No. 10471a; Lewis v. Baird, 3 McL. 56, Fed. Cas. No. 8316; Culbertson v. Wabash Nav. Co., 4 McL. 544, Fed. Cas. No. 3464; Postmaster-General

v. Reeder, 4 Wash. C. C. 678, Fed. Cas. No. 11311.

⁷ Mullanphy v. Phillipson, 1 Mo. 188.

⁸ Withers v. Greene, 50 U. S. (9 How.) 213, 13 L. Ed. 109.

⁹ Kirkpatrick v. White, 4 Wash. C. C. 595, Fed. Cas. No. 7850.

¹⁰ Brown v. Duchesne, 2 Curt. 97, Fed. Cas. No. 2003; Vermont v. Society for Propagation of the Gospel, 2 Paine 545, Fed. Cas. No. 16920.

¹¹ Staver v. Missimer, 6 Wash. 173, 32 Pac. 995.

it,¹ and of all former irregularities.² After a plea in bar to an action, the defendant can not plead in abatement, unless for new matter arising after the commencement of the suit.³ Hence it is too late to object that a writ has no seal after the defendant has pleaded to its merits;⁴ or to a mistake in the writ, or variance between the count and the writ, which must be taken advantage of by a plea in abatement.⁵ It can not be taken advantage of on general demurrer;⁶ nor by motion in arrest of judgment.⁷ So of omission to indorse a writ.⁸ In California the remedy for such variance is by motion. If a party fail to plead matter in bar to the original action, and judgment pass against him, he can not afterwards plead it in another action founded on that judgment, nor in a *scire facias*.⁹ Special pleas, the averments of which amount only to the general issue, are bad.¹⁰ A special plea, simply a traverse of a portion of facts which plaintiff is bound to prove to establish a *prima facie* right to recover, is bad, as amounting to the general issue.¹¹ In Alabama, it is no objection that a special plea presents matter of defense available under

¹ *Fugate v. Glasscock*, 7 Mo. 577; *Winter v. Norton*, 1 Ore. 42; *Potter v. Smith*, 7 R. I. 55; *Potter v. James*, 7 R. I. 313.

² *Bell v. Mobile & O. R. Co.*, 71 U. S. (4 Wall.) 598, 18 L. Ed. 338.

³ *Ricker v. Scofield*, 28 Ill. App. 32.

⁴ *Potter v. Smith*, 7 R. I. 55.

⁵ *Chirca v. Rehnicker*, 24 U. S. (11 Wheat.) 280, 6 L. Ed. 474; *McKenna v. Flisk*, 42 U. S. (1 How.) 241, 11 L. Ed. 117.

Compare: *Burrow v. Dickson*, 1 Tenn. (1 Overt.) 366.

⁶ *Duvall v. Craig*, 15 U. S. (2 Wheat.) 45, 4 L. Ed. 180; *Wilder v. McCormick*, 2 Blatchf. 31, Fed. Cas. No. 17650; *Triplet v. Warfield*, 2 Cr. C. C. 237, Fed. Cas. No. 14177.

⁷ *Wilson's Adm'r v. Berry*, 2 Cr. C. C. 707, Fed. Cas. No. 17791.

⁸ *Miller v. Gages*, 4 McL. 436, Fed. Cas. No. 9571.

⁹ *Dickson v. Wilkinson*, 44 U. S. (3 How.) 57, 11 L. Ed. 491.

¹⁰ *Van Ness v. Forrest*, 12 U. S. (8 Cr.) 30, 3 L. Ed. 478; *Liter v. Green*, 15 U. S. (2 Wheat.) 306, 4 L. Ed. 246; *Vowell v. Lyles*, 1 Cr. C. C. 329, Fed. Cas. No. 17020; *Matthews v. Matthews*, 2 Curt. 105, Fed. Cas. No. 9288; *Parker v. Lewis*, 1 Hempst. 72, Fed. Cas. No. 10741a; *Halsted v. Lyon*, 2 McL. 226, Fed. Cas. No. 5968; *Dibble v. Duncan*, 2 McL. 553, Fed. Cas. No. 3880; *Curtis v. Central R. Co.*, 6 McL. 401, Fed. Cas. No. 3501.

¹¹ *Knoebel v. Kircher*, 33 Ill. 308.

the general issue, which is also pleaded.¹² Bad pleas which are cured by verdict are those which, although they would be bad on demurrer, because wrong in form, yet still contain enough of substance to put in issue all the material points of the declaration.¹³ Where the pleas are bad, they should be demurred to by the plaintiff, and not traversed; but after the verdict of the jury the same effect will be given to them as if they had been demurred to; and they are not aided by the fact that immaterial issues have been formed upon them, and found for the defendant.¹⁴ Where an averment in a plea purports to be made by the plaintiff, instead of the defendant, it is bad on demurrer.¹⁵

§ 1098. — ACCORD AND SATISFACTION—ESSENTIAL AVERMENTS. The defense of accord and satisfaction must be specially pleaded,¹ as accord and satisfaction can not be

¹² *Hopkinson v. Shelton*, 37 Ala. 306.

¹³ *Garland v. Davis*, 45 U. S. (4 How.) 131, 11 L. Ed. 907, reversing 1 Hayw. & H. 125, Fed. Cas. No. 3636.

¹⁴ *Tams v. Lewis*, 42 Pa. St. 402.

¹⁵ *Barclay v. Ross*, 32 Ill. 211.

¹ ARIZ.—*Phillips v. Graham County*, 17 Ariz. 208, 149 Pac. 755. CAL.—*Piercy v. Sabin*, 10 Cal. 30; *Coles v. Soulsby*, 21 Cal. 47; *Sweet v. Burdett*, 40 Cal. 97; *Engineering Co., B. & W., v. Beam*, 23 Cal. App. 164, 137 Pac. 624; *Bresleauer v. McCormick-Saeltzer Co.*, 31 Cal. App. 284, 160 Pac. 251. COLO.—*Berdell v. Bissell*, 6 Colo. 162; *Harvey v. Denver & R. G. R. Co.*, 44 Colo. 258, 130 Am. St. Rep. 120, 99 Pac. 31. ME.—*Young v. Jones*, 64 Me. 563, 18 Am. Rep. 279. N. H.—*Watson v. Elliott*, 57 N. H. 511. N. Y.—*Jacobs v. Day*, 5 Misc. 410, 25 N. Y. Supp. 763. OHIO—*Ellis v. Bitzer*, 2 Ohio 89, 15 Am. Dec. 534. OKLA.—*Deming Invest. Co.*

v. McLaughlin, 30 Okla. 20, 118 Pac. 380; *Continental Gin Co. v. Arnold*, 48 Okla. 332, 153 Pac. 160. WYO.—*Rawlins, City of, v. Jungquist*, 16 Wyo. 403, 96 Pac. 144.

"Accord and satisfaction," as it is known and applied in the law, means the substitution of a new agreement for and in satisfaction of a pre-existing agreement between the same parties; whereby one of two parties, having a right of action against the other upon a claim arising out of an existing agreement, agrees to accept from the other party something in satisfaction of such right of action different from and usually less than that which might be recovered upon the original obligation; and which agreement, when executed, extinguishes the antecedent liability.—*Engineering Co., B. & W., v. Beam*, 23 Cal. App. 164, 137 Pac. 924. See *Heath v. Vaughn*, 11 Colo. App. 384, 385, 53 Pac. 229. —Agreement to accept the

shown under a general denial,² or a plea of payment;³ evidence of the discharge of the debt sued on, pending the action, is admissible only under this plea.⁴ The plaintiff on an execution may receive promissory notes by a special agreement, as an absolute payment of the same, but the agreement must be proved by testimony other than the sheriff's certificate.⁵ An accord and satisfaction after issue joined must be pleaded specially as happening since the last continuance.⁶ A plea of accord and satisfaction

smaller sum must be carried out, or there is no "satisfaction," although there may have been an "accord."—*Holton v. Noble*, 83 Cal. 7, 23 Pac. 58. See *Hogan v. Burns*, 4 Cal. Unrep. 62, 33 Pac. 631; *Dellapiazza v. Foley*, 112 Cal. 380, 386, 44 Pac. 727.

As to accord and satisfaction by part payment, see note 20 L. R. A. 785.

Acceptance by the parties must be pleaded and proved.—*Deming Invest. Co. v. McLaughlin*, 30 Okla. 20, 118 Pac. 380.

Affirmative allegations good as a plea of accord and satisfaction, under the Washington Code (Rem. & Bal. Code, §§ 258, 264).—*Hargrave v. Colfax, City of*, 89 Wash. 467, 154 Pac. 824.

But in California, a denial that certain notes sued on had not been paid, and affirmatively affirming that they have been satisfied and discharged, does not plead an accord and satisfaction.—*Hogan v. Burns*, 4 Cal. Unrep. 62, 33 Pac. 631.

Agreement to accept conveyance of land, or, at plaintiff's option, a specified sum of money, in full satisfaction of a judgment sued on, alleging that plaintiff had

never exercised such option, although the defendant was ready and willing to convey or pay the sum named, was held to be a good plea of accord and satisfaction.—*Tucker v. Edwards*, 7 Colo. 209, 3 Pac. 233.

Allegation should be that the thing was delivered, or the money paid, to the plaintiff and received by him in full satisfaction and discharge of the cause of action.—*Rawlins, City of, v. Jungquist*, 16 Wyo. 403, 96 Pac. 144.

General issue and accord and satisfaction can not be pleaded in one pleading.—*Purdy v. Van Keuren*, 60 Ore. 263, 119 Pac. 149.

Evidence of plaintiff may establish without the plea being made by defendant.—*Engineering Co., B. & W., v. Beam*, 23 Cal. App. 164, 137 Pac. 624.

² *Harvey v. Denver & R. G. R. Co.*, 44 Colo. 258, 130 Am. St. Rep. 120, 99 Pac. 31; *Barnum v. Green*, 13 Colo. App. 254, 57 Pac. 757.

³ *First Nat. Bank v. Latham*, 37 Okla. 286, 132 Pac. 891.

⁴ *Jessup v. King*, 4 Cal. 331.

⁵ *Mitchell v. Hockett*, 25 Cal. 542, 85 Am. Dec. 151.

⁶ *Good v. Davis*, 1 Hempst. 16, Fed. Cas. No. 5530a.

must aver the payment and receipt in satisfaction.⁷ A mere readiness to perform the accord, or a tender of performance, or even part performance and readiness to perform the rest is not enough.⁸ A plea which alleges that the defendant executed to the plaintiff a deed of certain property, which was to be absolute in case the note sued on was not paid by a certain day, without alleging that the deed was accepted as a satisfaction, is bad.⁹

§ 1099. ——— WHAT IS AND WHEN ALLOWED. A satisfaction may result from the acceptance of another as debtor,¹ or from action for part of an entire demand;² or a payment of a less sum where the amount is disputed, but not otherwise.³ An agreement to receive some other thing instead of that specified in the contract, when executed is good;⁴ but part payment and tender is an unexecuted accord, and not a satisfaction.⁵ This plea is allowed to be put in after the defendant has already pleaded, where some new matter of defense arises after issue joined, such as payment, a release by the plaintiff, the discharge of the defendant under an insolvent or bankrupt law, and the like.⁶ A plea of accord and satisfaction founded upon services should aver that the services were accepted in satisfaction of the plaintiff's demand, otherwise the plea is bad.⁷

⁷ See Kerr's Cyc. Cal. Civ. Code, §§ 1521-1524; also, *United States v. Clarke*, 1 Hempst. 315, Fed. Cas. No. 14812; *Maze v. Miller*, 1 Wash. C. C. 328, Fed. Cas. No. 9362.

⁸ *Hearn v. Kiehl*, 38 Pa. St. 147, 80 Am. Dec. 472.

⁹ *Shaw v. Burton*, 5 Mo. 578.

¹ *Van Etten v. Troudden*, 67 Barb. (N. Y.) 342, 1 Hun 432, 3 Thomp. & C. 603.

² *O'Beirne v. Lloyd*, 43 N. Y. 248, reversing 31 N. Y. Super. Ct. Rep. (1 Sweeny) 19, 6 Abb. Pr. N. S. 387.

³ See: CAL.—*Holton v. Noble*, 83 Cal. 7, 23 Pac. 58. MINN.—*Truax v. Miller*, 48 Minn. 62, 50 N. W. 935. MO.—*Maack v. Schneider*, 51 Mo. 92. N. Y.—*Williams v. Irving*, 47 How. Pr. 440; judgment modified in 1 Hun 720. WIS.—*Slcotte v. Barber*, 83 Wis. 431, 53 N. W. 697.

⁴ *Howard v. Norton*, 65 Barb. (N. Y.) 161.

⁵ *Noe v. Christie*, 51 N. Y. 270.

⁶ 3 Bl. Com. 316; 2 Burr. L. Dict. 353; 2 Tidd's Pr. 847; 1 Burr. 232; Steph. Pl. 64.

⁷ *Johnson v. Hunt*, 81 Ky. 321.

§ 1100. — **ANOTHER ACTION PENDING—AS TO ESSENTIAL ALLEGATIONS: IDENTITY OF CAUSE AND PARTIES.** In some of the jurisdictions it is enough to allege a service of process for the same cause, without showing that a complaint has been filed or served for the same cause;¹ but this rule will not apply in those jurisdictions in which an action is commenced (1) by filing a complaint, and (2) the issuance of process and service of the summons. In the latter jurisdictions it must be shown that process has issued.² In California, in an action to recover land, an answer of another suit pending for the same cause must show that the same title, the same injury, and the same subject-matter are in controversy in both actions;³ and the same rule prevails in Kansas,⁴ Utah,⁵ and perhaps elsewhere. If the second action is brought on a title acquired after the commencement of the first, the defense will not avail.⁶ To sustain this defense, it must appear that the two actions are for the same identical cause; but where the plaintiff seeks to split an entire demand, and brings a suit for a part, and then another suit for the residue, the pendency of the former may be pleaded in abatement or bar of the second action.⁷ The pendency of an action for an accounting may be pleaded in abatement of a subsequent action between the same parties founded on one or more items involved in the prior action.⁸

The defense of a prior lis pendens is available only where the plaintiff, at least, in both actions is the same.⁹ It is enough to state merely that the action was between

¹ Gardner v. Clark, 21 N. Y. 399.

² See, post, § 1102, footnote 2.

³ Larco v. Clements, 36 Cal. 132; Martin v. Splivolo, 69 Cal. 611, 615, 11 Pac. 484; Leonard v. Flynn, 89 Cal. 535, 541, 23 Am. St. Rep. 500, 503, 26 Pac. 1097.

⁴ Buettinger v. Hurley, 34 Kan. 585, 589, 9 Pac. 197.

⁵ Beardsley v. Morrison, 18 Utah

478, 72 Am. St. Rep. 795, 56 Pac. 303.

⁶ Vance v. Ollinger, 27 Cal. 358.

⁷ Bendoragle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448.

⁸ Coubrough v. Adams, 70 Cal. 374, 11 Pac. 634.

⁹ O'Connor v. Blake, 29 Cal. 312; Walsworth v. Johnson, 41 Cal. 61.

the same parties. Describing the parties is unnecessary.¹⁰ In a plea in abatement that a prior suit is pending, the absence of an affidavit verifying allegations in the plea that parties and cause of action are the same is fatal.¹¹

§ 1101. ——— DISCONTINUANCE OF EFFECT: FOREIGN ACTION PENDING. It would seem that under the decisions of the New York courts a discontinuance of the other action, even after the answer, avoids this defense.¹ In California pleas in abatement are not favored,² and if the first action is dismissed before the trial of the second action,³ or after the trial of the second action is entered upon, but before its conclusion⁴ this will be a good answer to the plea in abatement. That a prior suit in personam, between the same parties and for the same cause of action, was pending in another state, at the time of bringing the action, is not a defense;⁵ but the pendency of a suit between the same parties and respecting the same subject-matter in another state may be pleaded in abatement in the courts of the United States.⁶ Where an appearance

¹⁰ Ward v. Dewey, 12 How. Pr. (N. Y.) 193.

¹¹ Trenton Bank v. Wallace, 9 N. J. L. (4 Halst.) 83; White v. Whitman, 1 Curt. 494, Fed. Cas. No. 17561.

¹ Beals v. Cameron, 3 How. Pr. (N. Y.) 414; Averill v. Patterson, 10 N. Y. 500, 1 Seld. Notes 170, 10 How. Pr. 85.

As to New Jersey rule see Hixon v. Schooley, 26 N. J. L. (2 Dutch.) 461.

² Thompson v. Lyon, 14 Cal. 39; Dyer v. Scalmanini, 69 Cal. 637, 639, 11 Pac. 327.

³ Dyer v. Scalmanini, 69 Cal. 637, 11 Pac. 327.

⁴ Moore v. Hopkins, 83 Cal. 270, 17 Am. St. Rep. 248, 23 Pac. 318.

⁵ Seevers v. Clements, 28 Md. 426; Sandwich Mfg. Co. v. Earl, 56

Minn. 390, 396, 57 N. W. 938; Douglass v. Phenix Ins. Co., 138 N. Y. 209, 34 Am. St. Rep. 448, 20 L. R. A. 118, 33 N. E. 938; Sargent v. Sargent Granite Co., 6 Misc. (N. Y.) 386, 26 N. Y. Supp. 737.

See, also, note 29 Am. St. Rep. 312.

Second action may be stayed upon application of defendant until determination of foreign action.

—Douglass v. Phenix Ins. Co., 138 N. Y. 209, 34 Am. St. Rep. 448, 20 L. R. A. 118, 33 N. E. 938; Sargent v. Sargent Granite Co., 6 Misc. (N. Y.) 386, 387, 26 N. Y. Supp. 737.

Compare: Curlette v. Olds, 110 App. Div. (N. Y.) 596, 35 N. Y. Civ. Proc. Rep. 308, 97 N. Y. Supp. 114.

⁶ Balch, ex parte, 3 McL. 221, Fed. Cas. No. 790.

in a foreign attachment suit in another state is after the service of a writ in an action between the same parties in this state, the pendency of the foreign suit can not be pleaded in bar or abatement of the action here.⁷

§ 1102. — — — WHAT MUST BE SHOWN. A plea to abate an action by reason of another action pending is not good unless it shows that the pending action was brought for the same cause as the one in which the plea is interposed.¹ To support a plea in abatement founded on the pendency of a prior action, it is necessary to show that process was issued in such action.² A plea which sets up, in bar of an action upon a contract, that property was attached in a previous suit to answer for the same demand, and was lost, should show how the loss occurred.³ A plea in abatement setting up pendency of a prior suit must show that the other court has jurisdiction of the action there pending.⁴ It has been held in New York that the answer should show where the action is pending. But pendency of another action in a court of another state, or in a court of the United States, is not generally a good defense.⁵

⁷ *Wilson v. Mechanics' Bank*, 45 Pa. St. 488.

¹ *Calaveras County v. Brockway*, 30 Cal. 325.

Consolidation of two suits, where no plea in abatement entered to the second suit, in *Putnam v. Lyon*, 3 Colo. App. 144, 32 Pac. 492.

² *Prime v. Gray*, 10 Cal. 522; *People ex rel. Carillo v. De La Guerra*, 24 Cal. 73; *Wilson v. Atlanta, K. & N. R. Co.*, 115 Ga. 171, 176, 41 S. E. 699; *Whelan v. Rio Grande Western R. Co.*, 111 Fed. 326, 328.

³ *Starr v. Moore*, 3 McL. 354, Fed. Cas. No. 13315.

⁴ *White v. Whitman*, 1 Curt. 494,

Fed. Cas. No. 17561; *Balch, In re*, 3 McL. 221, Fed. Cas. No. 790.

⁵ *Browne v. Joy*, 9 Johns. (N. Y.) 221; *Walsh v. Durkin*, 12 Johns. (N. Y.) 99; *Mexico, Republic of, v. Arrangois*, 1 Abb. Pr. (N. Y.) 437; affirmed in 12 N. Y. Super. Ct. Rep. (5 Duer) 643; *Burrows v. Miller*, 5 How. Pr. (N. Y.) 51; *Cook v. Litchfield*, 7 N. Y. Super. Ct. Rep. (5 Sandf.) 330, 10 N. Y. Leg. Obs. 330; reversed on another point 9 N. Y. 279, 1 Seld. Notes 195; *Hecker v. Mitchell*, 13 N. Y. Super. Ct. Rep. (6 Duer) 687, 5 Abb. Pr. 453; *People ex rel. McMahon v. Sheriff of Westchester County*, 1 Park. Cr. Rep. (N. Y.) 659, 10 N. Y. Leg. Obs. 298;

§ 1103. ——— WHEN DEFENSE DOES AND DOES NOT LIE.

A plea in abatement may be interposed to the entire action on the ground that another suit was pending for the same cause of action if the copy of the record be annexed. Still the proofs must show that the first cause of action is for the same matter sued for in the second suit.¹ A plea in abatement on the ground of the pendency of a former action will not be sustained, unless it appears that the plaintiff in the former action is the same as in the action in which the plea is offered, and that the cause of action in both is founded upon one entire contract, or upon one single or continuous tort.² Where two joint tort-feasors are sued separately for the same tort, the pendency of the suit against one can not be pleaded in abatement of the suit against the other.³ A plea in abatement interposed to two causes of action, good as to one cause and bad as to the other, is demurrable.⁴

It would also appear that proceedings other than an action—e. g., by petition—may be pleaded as a defense in the same way.⁵ Where defendant pleads another suit pending, and it appears no summons was ever issued on the complaint, and there was no voluntary appearance on the part of the defendant, it was held that there was no suit pending.⁶ So, where the complaint is so defective

O'Reilly v. New York & N. E. R. Co., 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244.

¹ Thompson v. Lyons, 14 Cal. 42; People ex rel. Carillo v. De La Guerra, 24 Cal. 73.

² Lindsay v. Stewart, 72 Cal. 540, 14 Pac. 516; Bryan v. Scholl, 109 Ind. 367, 10 N. E. 107; Phelps v. Winona & St. P. R. Co., 37 Minn. 485, 5 Am. St. Rep. 867, 35 N. W. 273; Hollister v. Stewart, 111 N. Y. 644, 19 N. E. 782.

³ State, Use of Bashe v. Boyce, 172 Md. 140, 20 Am. St. Rep. 458,

7 L. R. A. 272, 19 Atl. 366; Livingston v. Bishop, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330.

As to pendency of action against one tort feasor as affecting liability of others see note 92 Am. St. Rep. 883.

⁴ Pappe v. Trout, 3 Okla. 260, 41 Pac. 397.

⁵ See: Groshon v. Lyon, 16 Barb. (N. Y.) 461; Ogden v. Bodle, 9 N. Y. Super. Ct. Rep. (2 Duer) 611.

⁶ Weaver v. Conger, 10 Cal. 233; Primm v. Gray, 10 Cal. 522.

that a judgment entered thereon would be a nullity.⁷ So, where the other suit pending was for only a part of the same matter sued for in the second suit.⁸ The pendency of an action to quiet title to land will not abate a subsequent action between the same parties to recover possession of the same land in which the same facts are litigated.⁹ The plaintiff, at least, must be the same in both cases.¹⁰ An allegation in the answer that another action is pending between the parties for dissolution of a copartnership and settlement of accounts is immaterial, and can not bar the right of the plaintiff to have his title or interest in the property in controversy determined in an action to quiet title.¹¹ Some of the procedural codes allow the filing of an answer by way of plea in abatement, setting forth the pendency of another suit between the same parties, for the same cause of suit, and it is immaterial that a third party is joined in the former suit.¹²

§ 1104. — ARBITRATION AND AWARD—ESSENTIAL ALLEGATIONS: PERFORMANCE. An agreement to arbitrate must be especially set up, it is waived by pleading to the merits;¹ and an award must be especially pleaded.² In the plea of an agreement to arbitrate and an award in

⁷ Reynolds v. Harris, 9 Cal. 338.

⁸ Thompson v. Lyon, 14 Cal. 39.

⁹ Bolton v. Landers, 27 Cal. 104.

¹⁰ O'Connor v. Blake, 29 Cal. 314; Walworth v. Johnson, 41 Cal. 61.

¹¹ Pennie v. Hildreth, 31 Cal. 127, 22 Pac. 398.

¹² Crane v. Larsen, 15 Ore. 345, 15 Pac. 326. See Beyersdorf v. Sump, 39 Minn. 495, 12 Am. St. Rep. 678, 41 N. W. 101.

As to lack of parties plaintiff in former suit, see Bent v. Maxwell Land Grant R. Co., 3 N. M. 158, 3 Pac. 721.

¹ Chamberlin v. Hibbard, 26 Ore. 428, 38 Pac. 437.

² Piercy v. Sabin, 10 Cal. 30, 70 Am. Dec. 692.

Unexecuted agreement to arbitrate all disputes which shall arise in the execution of a contract, both as to the liability thereunder and as to the loss, is no bar to a suit upon the contract, because of the fact that the contract is void as an attempt to oust courts of their jurisdiction. — Williams v. Branning Mfg. Co., 154 N. C. 205, 47 L. R. A. (N. S.) 337, 70 S. E. 290.

As to validity and binding force of arbitration agreements, see 47 L. R. A. (N. S.) 337-448.

abatement of an action, although it may not be necessary to set forth its terms, its substance must be set forth so fully as to enable the court to say that if such an award was made the action is barred.³ An award or former recovery for the same cause is new matter, which must be specially stated in the answer, and is not otherwise available, even though it appears by plaintiff's evidence,⁴—a prior decision,⁵ turning on the same point, was reversed on the ground that as plaintiff did not appear to have been misled or surprised, and not having objected that the evidence of a defense not pleaded was not admissible, he could not have the judgment reversed because it had been admitted.⁶ An award which merely settles the amount due can not be pleaded in bar to the action without alleging performance; for the money until paid is due in respect of the original debt.⁷ And it is more recently held that it is not essential to the validity of the plea that payment of the amount awarded should be alleged.⁸

Submission of a cause to arbitration operates as a continuance.⁹ An award, to be effective as a bar to a subsequent suit over the same matters, should follow the terms of the submission, and should cover everything submitted; but nothing more. An award will not operate as a bar to

³ *Gihon v. Levy*, 9 N. Y. Super. Ct. Rep. (2 Duer) 176. See *Owen v. Casey*, 48 Wash. 673, 94 Pac. 473.

Award insufficiently pleaded where no written agreement for arbitration, no award filed with the clerk, and no approval by the court shown.—*Owen v. Casey*, 48 Wash. 673, 94 Pac. 473.

⁴ *Brazill v. Isham*, 1 E. D. Smith (N. Y.) 437; affirmed 12 N. Y. 9.

⁵ *Underhill v. Saratoga & W. R. Co.*, 20 Barb. (N. Y.) 460.

⁶ *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85, reversing 20 Barb. 468.

⁷ *Brazill v. Isham*, 1 E. D. Smith (N. Y.) 437; case affirmed but point questioned in 12 N. Y. 9.

⁸ See: *Terre Haute & L. R. Co. v. Harris*, 126 Ind. 7, 25 N. E. 831; *Giles Lithograph & L. Printing Co. v. Recamier*, 14 Daly (N. Y.) 475.

⁹ *Gunter v. Sanchez*, 1 Cal. 45, 47; *Draghicevich v. Vulicevich*, 76 Cal. 378, 380, 18 Pac. 406; *Callanan v. Port Huron & N. W. R. Co.*, 61 Mich. 15, 27 N. W. 718; *Camp v. Root*, 18 Johns. (N. Y.) 22; *Green v. Patchen*, 13 Wend. (N. Y.) 293.

an action wherein there appear other facts and issues not contemplated in the original submission or included in the award.¹⁰ Where the defendant sets up an award as a defense to an action, the objections thereto that the arbitrators proceeded illegally and that the defendant broke his agreement, are not grounds for excluding evidence offered in support of the plea, but they may be grounds for defeating it.¹¹

§ 1105. — **BANKRUPTCY OR INSOLVENCY — ESSENTIAL AVERMENTS.** A discharge in bankruptcy, under the federal statute, or in insolvency, under the state statute, may be pleaded in bar of an action, being a defense that goes to the merits or grounds of the action,¹ where either of such statutes were properly pursued in procuring such discharge, as against all persons having due and legal notice of the proceedings. The defense, however, is one of privilege which must be specially pleaded to be availed of,² and if not so pleaded is deemed to have been waived;³ it can not be set up in a collateral proceeding.⁴ A defendant is entitled to so plead a discharge, by way of a supplemental answer, as against an action commenced after the filing of the proceedings in bankruptcy or insolvency and before discharge obtained;⁵ and when a discharge is granted after a judgment in the action, but before the judgment is recorded, the defendant can assert his discharge by a motion to recall and set aside an execution issued on the judgment.⁶

¹⁰ See: *Mt. Desert v. Tremont*, 75 Me. 252; *Truesdale v. Straw*, 58 N. H. 218; *Garrow v. Nicolai*, 24 Ore. 76, 32 Pac. 1036.

¹¹ *Lilley v. Tuttle*, 52 Colo. 121, 117 Pac. 896.

¹ *Tuttle v. Scott*, 119 Cal. 588, 51 Pac. 849.

² *Id.*; *Rahm v. Minis*, 40 Cal. 421; *Anderson v. Goff*, 72 Cal. 68, 1 Am. St. Rep. 34, 13 Pac. 73; *Waggle v.*

Worthy, 74 Cal. 266, 5 Am. St. Rep. 440, 15 Pac. 831.

See, also, authorities footnote 9, this section.

³ *Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440, 15 Pac. 831.

⁴ *Id.*

⁵ *Rahm v. Minis*, 40 Cal. 421.

⁶ *Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. 299.

Plea not favored, and may be defeated by proof of fraud.⁷ The bankruptcy of the plaintiff must be specially pleaded.⁸ So bankruptcy of the defendant must be specially pleaded.⁹ It is not properly a plea in abatement, but it is rather a plea in bar; and until such plea is interposed, the plaintiff is not bound to take notice of the bankruptcy of the defendant.¹⁰ To a suit brought in the name of a bankrupt subsequent to the appointment of his assignee, the defendant may plead the bankruptcy of the plaintiff, and the appointment of the assignee in abatement.¹¹ It is not essential to admit the existence of the debt.¹² But it should be averred to have been provable under the act.¹³ A special averment that the demandant in suit was included in the list of creditors contained in the petition is unnecessary.¹⁴ It has been held in New York, a plea of discharge under the voluntary provisions of the Bankrupt Act must aver positively that the defendant, at the time of presenting the petition, owed debts. Averring that the petition so alleged is not sufficient.¹⁵ In pleading an insolvent's discharge, it is not necessary to state the facts conferring jurisdiction on the officer who granted it.¹⁶ A discharge in insolvency is no bar to an action brought by a nonresident creditor who was not a party to

⁷ *Fellows v. Hall*, 3 McL. 281, Fed. Cas. No. 4722. See: *McEachran*, 82 Cal. 219, 23 Pac. 46; *Strang v. Bradner*, 114 U. S. 555, 29 L. Ed. 248, 5 Sup. Ct. Rep. 1038, affirming 89 N. Y. 299.

⁸ *Cook v. Lansing*, 3 McL. 571, Fed. Cas. No. 3162.

⁹ *Fellows v. Hall*, 3 McL. 281, Fed. Cas. No. 4722; *Cutter v. Folsom*, 17 N. H. 139; *Hollister v. Abbott*, 31 N. H. 442, 64 Am. Dec. 342.

See, also, authorities in footnote 2, this section.

¹⁰ *Fellows v. Hall*, 3 McL. 281,

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Fed. Cas. No. 4722; *Detroit Stove Works v. Osmun*, 75 Mich. 7, 41 N. W. 845.

¹¹ *Cook v. Lansing*, 3 McL. 571, Fed. Cas. No. 3162.

¹² *McCormick v. Pickering*, 4 N. Y. 276.

¹³ *Sackett v. Andross*, 5 Hill (N. Y.) 327.

¹⁴ *McCormick v. Pickering*, 4 N. Y. 276.

¹⁵ *Varnum v. Wheeler*, 1 Den. (N. Y.) 331; *Dresser v. Brooks*, 3 Barb. (N. Y.) 429.

¹⁶ *Livingston v. Oaksmith*, 13 Abb. Pr. (N. Y.) 183.

the insolvency proceedings.¹⁷ So, a discharge in insolvency only affects such debts of the insolvent as existed at the time his petition was filed.¹⁸ A plea that defendant did owe debts which are not within the excepted classes, and that he presented a petition, etc., imports that he was a bankrupt within the act.¹⁹ It should be averred that the plaintiff's debt did not arise by reason of a defalcation as a public officer, etc., which debts are excepted by the act.²⁰

§ 1106. ——— PRESENTATION OF PAPERS—VOLUNTARY ASSIGNMENT. A discharge duly granted under the Bankrupt Act may be pleaded by a simple averment that on the day of its date such discharge was granted to him, setting the same forth in *haec verba*, as a full and complete bar to all suits brought, the certificate to be conclusive evidence of the facts of the discharge.¹ This is the rule to be followed in this class of answers.² A general allegation that such affidavits, schedules, and other necessary and proper papers as are required by the Bankrupt Act were presented, is not enough, but the plea should state what

¹⁷ CAL.—*Rhodes v. Borden*, 67 Cal. 1, 6 Pac. 867; *Bean v. Laryea*, 81 Cal. 151, 22 Pac. 513. ORE.—*Main v. Messner*, 17 Ore. 78, 20 Pac. 255. VT.—*Bedell v. Scruton*, 54 Vt. 493; *Roberts v. Atherton*, 60 Vt. 563, 6 Am. St. Rep. 133, 15 Atl. 159. FED.—*Denny v. Bennett*, 128 U. S. 489, 32 L. Ed. 491, 9 Super. Ct. Rep. 134, affirming 33 Minn. 530, 24 N. W. 193.

¹⁸ *Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440, 15 Pac. 831.

¹⁹ *McNulty v. Frame*, 3 N. Y. Super. Ct. Rep. (1 Sandf.) 128.

²⁰ *Maples v. Burnside*, 1 Den. (N. Y.) 332; *Sackett v. Andross*, 5

Hill (N. Y.) 327; *Dresser v. Brooks*, 3 Barb. (N. Y.) 429.

¹ Bankruptcy Act, as amended by Act June 25, 1910, ch. 412, 36 Stats. at L. 838; 1 Fed. Stats. Ann., 2d ed., pp. 504-1222.

² Forms for pleading discharge under the various bankruptcy acts are found in the following cases: *Ruckman v. Cowell*, 1 N. Y. 505; *Stephens v. Ely*, 6 Hill (N. Y.) 607; *Seaman v. Stoughton*, 3 Barb. Ch. (N. Y.) 344; *Johnson v. Fitzhugh*, 3 Barb. Ch. (N. Y.) 360; *Morse v. Cloyes*, 11 Barb. 100; *Balch, In re*, 3 McL. 221, Fed. Cas. No. 790; *White v. How*, 3 McL. 291, Fed. Cas. No. 17543.

papers were presented.³ It should be averred that the petition of the bankrupt was presented to the court, and the discharge granted by the court, and not by the judge.⁴

A voluntary assignment by debtors for the benefit of their creditors, which would have been good at common law, and was permitted by the state Insolvency Law, was held valid, although the United States Bankrupt Law was in force, and applicable at the time of the assignment.⁵ The statute of California for the relief of insolvent debtors and protection of creditors⁶ is in conflict with the Federal Bankrupt Law, and was suspended from the time the latter law went into effect.⁷ This statute was not repealed by the Code, but has been superseded by an act of the legislature, approved March 26, 1895, which is now in force. Debt resulting from the neglect of an attorney-at-law to pay over to his client money which he had collected for him is not a debt contracted while acting in a fiduciary capacity, and was not as such excepted from being discharged by a certificate under the United States Bankrupt Act of 1841.⁸

§ 1107. ——— WHAT AMOUNTS TO COMPOSITION—PLEADINGS. A note given in consideration of an antecedent indebtedness does not per se discharge the debt. In the absence of an agreement to the contrary, the only effect is to suspend the remedy until the maturity of the note.¹ If the creditors of a failing debtor agree among them-

³ Sackett v. Andross, 5 Hill (N. Y.) 327.

⁴ Id.; Gillon v. Bruen, 5 N. Y. Leg. Obs. 227.

⁵ Hawkin's Appeal, 34 Conn. 548; Sedgewick v. Place, 34 Conn. 552, note.

⁶ Hitt. C. & S., 15505.

⁷ Martin v. Berry, 37 Cal. 208.

⁸ Wolcott v. Hodge, 81 Mass. (15 Cray) 547, 77 Am. Dec. 381.

¹ Smith v. Owens, 21 Cal. 11; Comptoir D'Escompete De Paris v. Dresbach, 78 Cal. 15, 20, 20 Pac. 28; Brown v. Olmsted, 50 Cal. 165; Tolman v. Smith, 85 Cal. 280, 287, 24 Pac. 743; Savings & Loan Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922; Dellapiazza v. Foley, 112 Cal. 380, 44 Pac. 727; Jenne v. Burger, 120 Cal. 444, 447, 52 Pac. 706; Otto v. Griffin, 54 Wash. 508, 103 Pac. 790.

selves, with the assent of the debtor, to a composition of their respective debts, and to receive in lieu thereof securities of a certain character, and one of the creditors subsequently obtains from the debtor new notes of a character more favorable to the creditor than those provided for in the composition agreement, such new notes are void for fraud, not only as to the other creditors, but as to the assenting debtor.² Where composition is relied on as a defense, it must be specially pleaded.³ A plea of an assignment for the benefit of creditors made as a composition is bad on demurrer, if it does not aver payment or a tender of the composition, although it stated that defendant was always ready and willing to pay the same.⁴

§ 1108. — CREDIT UNEXPIRED — ESSENTIAL ALLEGATIONS. An allegation in an answer that certain goods were sold on a credit which had not expired, is a conclusion of law,¹ the facts from which the conclusion is drawn should be stated. Under a general denial defendant may prove that credit given has not yet expired.² Such a plea is held to be not new matter requiring a reply, but a special denial that the defendant is indebted as alleged in the complaint.³ It would seem that in Pennsylvania the fact that a suit was brought in violation of an agreement to give time is not a reason for dismissing the action; it should have been regularly pleaded and tried.⁴ A covenant not to sue may be pleaded in bar of an action where founded

² *Smith v. Owens*, 21 Cal. 11; *Graham v. Meyer*, 99 N. Y. 611, 1 N. E. 143, affirming 33 Hun 489.

³ *Smith v. Owens*, 21 Cal. 11.

⁴ *Fessard v. Mugnier*, 18 C. B. 286.

Allegations of answer setting up an assignment for benefit of creditors made as a composition, see *Watkinson v. Inglesby*, 5 Johns. (N. Y.) 386.

Allegations of answer alleging

composition by giving renewal notes which the plaintiff subsequently refused to receive, see *Warburg v. Wilcox*, 2 Hilt. (N. Y.) 118, 7 Abb. Pr. 336.

¹ *Levinson v. Schwartz*, 22 Cal. 229, 83 Am. Dec. 61.

² *Landis v. Morrissey*, 69 Cal. 83, 87, 10 Pac. 258.

³ *Gilbert v. Cram*, 12 How. Pr. (N. Y.) 455.

⁴ *Murdock v. Steiner*, 45 Pa. St.

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upon a sufficient consideration;⁵ but it has been said that a covenant not to sue for five years is no bar to an action within that time.⁶ The objection that the suit was commenced before the cause of action accrued should be taken by answer.⁷

§ 1109. — DEATH—ACTION DOES NOT ABATE WHEN. Under the provisions of the California procedural code,—and similar provisions are found in other jurisdictions,—an action shall not abate by death or other disability of a party, or by the transfer of any interest therein, if the cause of action survives. But the court on motion may allow the action to be continued by or against his representative¹ or successor in interest.² In case of any other transfer of interest, the action may be continued in the name of the original party, or the person to whom the transfer is made may be substituted.³ The California procedural code⁴ gives a party the right to intervene during the pendency of suit, either before or after issue joined;⁵ but an intervention can not be allowed after final judgment.⁶

⁵ *Staver v. Missimer*, 6 Wash. 173, 36 Am. St. Rep. 142, 32 Pac. 995.

As to validity and effect of agreement not to sue, see note 36 Am. St. Rep. 145.

⁶ *Howland v. Marvin*, 5 Cal. 501. Covenant not to sue, legal effect of.—*Chicago, City of, v. Babcock*, 143 Ill. 358, 32 N. E. 271.

⁷ *Smith v. Holmes*, 19 N. Y. 271.

¹ As to decedent's representative and bringing him in, see, ante, § 654.

² As to intervenors and intervention, see, ante, §§ 667-672.

Party dead so long action can not be revived without consent of parties, which is not given, action abates.—*New Hampshire Banking*

Co. v. Ball, 57 Kan. 812, 48 Pac. 137.

³ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 385.

As to prosecution by assignor of chose in a pending action, see, ante, § 643.

⁴ *Kerr's Cyc. Cal. Code Civ. Proc.*, 2d ed., § 387, Consolidated Supp. 1906-1913, p. 1418.

⁵ See: *Brooks v. Hager*, 5 Cal. 281, 282; *Coburn v. Smart*, 53 Cal. 742, 744; *Farley v. St. Paul Invest. & Sav. Soc.*, 110 Minn. 311, 316, 125 N. W. 676, 678.

As to who may intervene, see note 16 Am. Dec. 181.

⁶ *Laugenour v. Shanklin*, 57 Cal. 70; *Carey v. Brown*, 58 Cal. 180; *Owen v. Colgan*, 97 Cal. 454,

*Whether cause of action survives on the death of a party depends upon the statutory provision of the jurisdiction in which the action is brought.*⁷ But an action for a penalty and causes of action *ex contractu* die with the defendant;⁸ and actions for trespass do not survive.⁹ The California procedural code-section above cited applies in cases only where the cause of action survives against the surviving defendant.¹⁰ It is not desirable or practical, in this place, to analyze the statutes and cite the cases in the various jurisdictions, but the following may be given:

—*At common law*, in actions *ex delicto*, where the wrongdoer acquired no real gain, although the injured party may have suffered much loss, the death of either party destroyed the right of action.¹¹

—*In Colorado*, the general rule is that actions at law do not abate with the death of the person, the exceptions being given in the statute,¹² and the same seems to be true in Montana.¹³ Thus, under the Colorado statute, an action against a firm to recover damages for any injury caused by negligence, the death of a partner of the firm does not work an abatement of the action, or render a new complaint necessary.¹⁴

455, 32 Pac. 519; *Baines v. West Coast Lumber Co.*, 104 Cal. 1, 37 Pac. 767.

See, also, authorities cited in footnote 4, this section.

⁷ *Hatfield v. Bushnell*, 1 Blatchf. 393, Fed. Cas. No. 6211.

⁸ *Henshaw v. Miller*, 58 U. S. (17 How.) 212, 15 L. Ed. 222; *Jones v. Vanzandt*, 4 McL. 604, Fed. Cas. No. 7504.

⁹ *Dyckman v. Allen*, 2 How. Pr. (N. Y.) 17.

¹⁰ *Williams v. Kent*, 15 Wend. (N. Y.) 360.

¹¹ See: FLA.—*Barnum v. Townsend*, 23 Fla. 355. IND.—

Hamilton v. Jones, 125 Ind. 176. MD.—*McCurley v. McCurley*, 60 Md. 185, 45 Am. Rep. 717. MASS.—*Mellen v. Baldwin*, 4 Mass. 480; *Holmes v. Moore*, 22 Mass. (5 Pick.) 257; *Wilbur v. Gilmore*, 38 Mass. (21 Pick.) 250. S. C.—*Middleton v. Robinson*, 1 Bay 58, 1 Am. Dec. 596. UTAH—*Mason v. Union Pac. R. Co.*, 7 Utah 77, 24 Pac. 796.

¹² *Kelley v. Union Pac. R. Co.*, 16 Colo. 455, 27 Pac. 1058; *Munn v. Brown*, 70 Fed. 967.

¹³ Mont. Code Civ. Proc., § 587.

¹⁴ *Rice v. Van Why*, 49 Colo. 35, 111 Pac. 599.

—*In Indiana*, under the statutory provision, an action in form *ex contractu* to recover damages for an injury to the person, does not survive against the personal representative;¹⁵ but it is otherwise where the action is based on any injury to the estate, as distinguished from a mere nonpecuniary personal injury.¹⁶ Thus, a cause of action founded on a breach of duty by an attorney, causing serious injury to his client's property rights and interests, survives.¹⁷

—*In New York*, under the statute, although technically sounding in tort, an action for injury to property survives, in the same manner as an action on contract.¹⁸ The state statute has changed the practice in this respect, for at common law, as we have seen, all personal actions die with the party.¹⁹

—*In Virginia*, where the action is founded on a tort, unconnected with contract, affects the person only, and not the estate, the action abates with the death of either party; but where the action is founded upon a contract, although nominally laid in tort, the cause of action survives.²⁰

—*In equity*, the action or suit does not abate by death of a coplaintiff or codefendant; the suit may be amended by adding the necessary parties.²¹

§ 1110. — — AFTER VERDICT. In California, where a party to an action dies after verdict or other decision thereon, judgment in pursuance of such verdict or de-

¹⁵ *Hess v. Lowrey*, 122 Ind. 225, 17 Am. St. Rep. 355, 7 L. R. A. 90, 23 N. E. 156; *Hamilton v. Jones*, 125 Ind. 177, 52 N. E. 192.

¹⁶ *Hess v. Lowrey*, 122 Ind. 225, 17 Am. St. Rep. 355, 7 L. R. A. 90, 23 N. E. 156; *Feary v. Hamilton*, 140 Ind. 52, 39 N. E. 516; *Hedekin v. Gillespie*, 33 Ind. App. 653, 72 N. E. 143.

¹⁷ *Newman v. Gates*, 165 Ind. 174, 6 Ann. Cas. 649, 72 N. E. 638.

¹⁸ *Haight v. Hayt*, 19 N. Y. 464; *Cregin v. Brooklyn Crosstown R. Co.*, 175 N. Y. 192, 31 Am. Rep. 459, 56 How. Pr. 465.

¹⁹ See authorities cited in footnote 14, this section.

²⁰ *Lee v. Hill*, 87 Va. 497, 24 Am. St. Rep. 666, 12 S. E. 1052.

²¹ *Fisher v. Rutherford, Baldw.* 188, Fed. Cas. No. 4823.

cision may nevertheless be rendered, as provided by the procedural code;¹ but in no other such case can judgment be rendered so as to affect the interests of the representatives or successors of the party deceased, without the proper substitution of such representatives or successors.² Such judgment, however, is not a lien on the real estate of the deceased party, but is payable in the course of administration.³ A judgment against a dissolved corporation is void.⁴ In Wisconsin, where a party dies after verdict or other decision in the action, judgment can not be rendered thereon without due and proper substitution.⁵

§ 1111. ——— CIVIL DEATH. In those cases in which either the plaintiff or defendant, in a pending action, is sentenced to state prison for the term of his natural life, and is for that reason regarded as "civilly dead," the action abates;¹ but the abatement can not be pleaded by the party thus sentenced and so civilly dead; it must be by his representatives.²

A corporation which has been duly and regularly dissolved according to statutory provisions, and may therefore be said to be "civilly dead," incapable of suing or being sued, can not defend an action against such corporation, and any judgment against the corporation is void.³ The provisions of statutes such as the California

¹ Kerr's Cyc. Cal. Code Civ. Proc., § 669.

² Judson v. Love, 35 Cal. 463.

³ Kerr's Cyc. Cal. Code Civ. Proc., § 669.

⁴ Crossman v. Vivienda Water Co., 150 Cal. 575, 581, 89 Pac. 335.

⁵ Moehlenpah v. Mayhem, 138 Wis. 561, 566, 119 N. W. 826, 828.

¹ Grahams v. Adams, 2 Johns. Cas. (N. Y.) 408; O'Brien v. Hagan, 8 N. Y. Super. Ct. Rep. (1 Duer) 664.

² Freeman v. Frank, 10 Abb. Pr. (N. Y.) 370.

Judgment against convict imprisoned in state prison, in a civil action, may be revoked or set aside upon proper proceedings.—Rice County Commrs. v. Lawrence, 29 Kan. 163.

³ Crossman v. Vivienda Water Co., 150 Cal. 575, 581, 89 Pac. 335; Pullman v. Stebbins, 51 Fed. 10.

Creditors' bill in equity, to discover assets of dissolved corporation will lie without having first secured a judgment at law.—Pullman v. Stebbins, 51 Fed. 10.

As to conditions precedent to

Civil Code,⁴ making the directors of the corporation trustees, in the absence of the appointment of other persons by the court, to manage the affairs of the corporation for the creditors and stockholders or members of such corporation, with full power to settle the affairs of the corporation, does not empower such cestuis que trust to defend an action in the name of the corporation;⁵ and under the provisions of the procedural code of the same state,⁶ the cestuis que trust will have to be brought in by motion in a pending action, and continue it in their own names, instead of in the name of the corporation.⁷ After dissolution, the remedy of creditors is an action against the directors as cestuis que trust and the stockholders, and not against the "dead" corporation;⁸ for a corporation can not relieve itself and its members from liability by simply going out of business;⁹ and the appointment of a receiver for a corporation does not prevent a suit against it upon an obligation entered into prior to the receivership.¹⁰

§ 1112. — — — OF SOLE PLAINTIFF—IN GENERAL. A cause of action can not exist in favor of a deceased person;¹ but if a party to an action dies before the termination of the litigation, the question whether the action is thereby terminated depends upon whether the cause of

equitable remedies by creditors of corporation, see note 23 L. R. A. (N. S.) 1-123.

⁴ Kerr's Cyc. Cal. Civ. Code, § 400.

⁵ Crossman v. Vivienda Water Co., 150 Cal. 575, 581, 89 Pac. 335; Sturges v. Vanderbilt, 73 N. Y. 384.

As to abatement of action by dissolution of corporation, see note 32 L. R. A. (N. S.) 446-453.

⁶ Kerr's Cyc. Cal. Code Civ. Proc., § 385.

⁷ Crossman v. Vivienda Water Co., 150 Cal. 575, 581, 89 Pac. 335; See, also: Judson v. Love, 35 Cal. 463; McCulloch v. Norwood, 58 N. Y. 562, 568.

⁸ See authorities in footnote 5, this section.

⁹ Jones v. Herald Co., 44 S. C. 526.

¹⁰ Allen v. Olympia Light & Power Co., 13 Wash. 307, 43 Pac. 55.

¹ Dillon v. Great Northern R. Co., 38 Mont. 485, 100 Pac. 960.

action is one that survives under the statute.² If the cause of action is one that survives, on the death of a sole plaintiff, the action may be continued in the name of the representative of the decedent.³

§ 1113. — — — — — BEFORE TRIAL. Where plaintiff in an action died before trial, and the subsequent order for judgment contained a recital as follows: "This action having been continued, in consequence of death of plaintiff, by his executor, Samuel Webb, and jury having found verdict for plaintiff, and then awarded judgment in favor of plaintiff," it was held that the recital sufficiently showed a suggestion of death¹ of original plaintiff, and continuance and revival of the cause in the name of the executor;² but where jurisdiction of the court has attached, a continuance of the cause and the entry of the judgment in the name of deceased party, it has been said, is a mere irregularity and voidable only,³ although there are cases to the contrary.⁴

² *Stivers v. Byrnett*, 56 Ore. 565, 108 Pac. 1014, 109 Pac. 386.

³ *Kittle v. Bellegrade*, 86 Cal. 556, 25 Pac. 55; *Campbell v. West*, 93 Cal. 653, 29 Pac. 219; *Cockrill v. Clyma*, 98 Cal. 123, 32 Pac. 888; *Bain v. Pine*, 1 Hill (N. Y.) 615, 616; *Reed v. Butler*, 11 Abb. Pr. (N. Y.) 128; *Jarvis v. Felch*, 14 Abb. Pr. (N. Y.) 46; *Banta v. Marcellus*, 2 Barb. (N. Y.) 373; *Ridgeway v. Buckley*, 7 How. Pr. (N. Y.) 269.

¹ As to suggestion of death on the record, see, post, § 1121.

² *Sanchez v. Roach*, 5 Cal. 248.

³ CAL.—*Gregory v. Haynes*, 21 Cal. 443, 446. ILL.—*Danforth v. Danforth*, 111 Ill. 242. IOWA—*Gilman v. Donovan*, 53 Iowa 362, 5

N. W. 560. MINN.—*Hayes v. Shaw*, 20 Minn. 405. MO.—*Coleman v. McAnulty*, 16 Mo. 173, 57 Am. Dec. 229. NEB.—*Woodward v. Leonard*, 78 Neb. 531, 111 N. W. 134. N. C.—*Wood v. Watson*, 107 N. C. 52, 10 L. R. A. 541, 12 S. E. 49.

As to validity of judgment for or against a deceased person, see note 126 Am. St. Rep. 622-638.

Continuance in name of deceased instead of representative, does make any judgment thereafter rendered in his favor void.—*Gregory v. Haynes*, 21 Cal. 443, 446.

⁴ *Jacobson v. Campbell* (Ark.), 12 S. W. 784; *Ewald v. Corbett*, 32 Cal. 493; *McGreery v. Everding*, 44 Cal. 284; *Richter v. Beaumont*, 71 Miss. 713, 16 So. 293.

§ 1114. — — — BEFORE ARGUMENT. The rule is different if the death occurs previous to argument. In that event, proceedings can only be had upon leave given after suggestion of death is made.¹

Death after argument, judgment is to be entered as of a date prior to the death of the party.²

§ 1115. — — — ONE OF SEVERAL PLAINTIFFS—HUSBAND AND WIFE. In the case of several plaintiffs and one of the coplaintiffs dies pending the action, the regulation as to continuing the action and bringing in the personal representative of the deceased party applies the same as in the case of a sole plaintiff.¹ When a husband and wife are parties plaintiff, and the husband dies pending the action, the wife may proceed or not, at her election, and is not liable for costs if she refuses.² A demand in right of the wife does not abate on death of the husband.³ If, after a decree of divorce, directing division of the common property, the husband dies, the heirs must be substituted as parties in his stead,⁴ and the same is true in a partition case.⁵

§ 1116. — — — OF SOLE DEFENDANT—IN GENERAL. In the case of the death of the sole defendant before verdict or judgment, his representatives can not be substituted against the wishes of plaintiff, unless the defendant has acquired some rights in the litigation, as where a counterclaim has been pleaded.¹ An action in such case for the

¹ Black v. Shaw, 20 Cal. 68;
Warren v. Eddy, 32 Barb. (N. Y.)
664, 13 Abb. Pr. 28.

² Black v. Shaw, 20 Cal. 68.

See, post, § 1120.

¹ See, ante, § 1112.

² Dewall v. Covenhoven, 5 Pal.
Ch. (N. Y.) 581.

See Mitford on Chancery Plead-
ing 59.

³ Id.; McDowell v. Charles, 6
Johns. Ch. (N. Y.) 132.

⁴ Ewald v. Corbett, 32 Cal. 493.

⁵ Lyon v. Register, 36 Fla. 273,
282, 18 So. 589.

¹ Livermore v. Bainbridge, 61
Barb. (N. Y.) 358, 43 How. Pr.
212; affirmed, 49 N. Y. 125.

As to substitution of personal
representative of decedent, see,
ante, §§ 654, 692-699; Mitchell v.
Schoonover, 16 Ore. 211, 17 Pac.
867; Strong v. Eldridge, 8 Wash.
595, 36 Pac. 696.

recovery of possession of specific personal or real property wholly abates.² It is otherwise under the California procedural code³ which provides that "any person or his personal representative may maintain an action against the executor or administrator of any testator or intestate, who, in his lifetime, has wasted, destroyed, taken, or carried away, or converted to his own use, the goods and chattels of any such person, or committed any trespass on the real estate of such person." In an action to recover damages for death by a wrongful act, the action may be continued against personal representatives of defendant.⁴

In action between husband and wife, by the wife for divorce, and the husband dies after decree of divorce is granted, a supplemental decree, entered without revivor as to his heirs, ordering a sale of the community property and a division of the proceeds, is void as to the heirs.⁵ But in Illinois it is held that the wife may, after the death of the husband, prosecute a writ of error to reverse the decree.⁶

§ 1117. — — — BEFORE OR AFTER JUDGMENT.

Death of defendant before judgment destroys the lien of an attachment, and the property passes into possession of the administrator.¹ The death of a party before judg-

Death after levy of attachment, 145; *Yertore v. Wiswall*, 16 How. Pr. (N. Y.) 8.

of defendant, does not vacate or dissolve the attachment.—Id.

See, however, discussion and authorities, ante, § 1109.

Compare: Authorities, post, § 1117, footnote 1.

⁵ *Ewald v. Corbett*, 32 Cal. 493, 499.

² *Mosely v. Mosely*, 11 Abb. Pr. (N. Y.) 105; *Putnam v. Van Buren*, 7 How. Pr. (N. Y.) 31; *Moseley v. Albany & Northern R. Co.*, 14 How. Pr. (N. Y.) 71; *Hopkins v. Adams*, 13 N. Y. Super. Ct. Rep. (6 Duer) 685, 5 Abb. Pr. 351.

See, post, § 1117, footnote 5.

³ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 1584.

⁶ *Danforth v. Danforth*, 111 Ill. 243.

⁴ *Doedt v. Wiswall*, 15 How. Pr. (N. Y.) 128; affirmed 15 How. Pr.

¹ *Myers v. Mott*, 29 Cal. 359, 89 Am. Dec. 49; *Hensley v. Morgan*, 47 Cal. 622; *Ham v. Cunningham*, 50 Cal. 365.

Compare: Ante, § 1116, reading paragraphs in footnote 1.

ment, when presumed, though not proved, renders any subsequent proceedings irregular.² The death of a party after hearing, but before actual decision, works no abatement; judgment may be entered *nunc pro tunc*.³ Death of party after decree works no abatement.⁴

An action for divorce, decree not having been awarded, can not survive the death of either party, and where the plaintiff in such action dies prior to the entry of a judgment decreeing a divorce in her favor the court is deprived of all power to review its action and determine her right to a divorce;⁵ but the rule is otherwise where a decree of divorce has been awarded.⁶

Supplementary proceedings abate by death of defendant debtor.⁷

§ 1118. — — — ONE OF SEVERAL DEFENDANTS — IN GENERAL. In those cases in which there are several defendants and one of the codefendants dies pending the suit, the action may be continued as to the others.¹ Where defendants are executors, trustees, joint tenants, or copartners, the action continues against the survivors.²

*Under California procedural code*³ there may be a substitution of the representative of the decedent in all causes of action which do not abate, under the statute, on the death of the party.⁴

² *Gerry v. Post*, 13 How. Pr. (N. Y.) 118.

³ *Crawford v. Wilson*, 4 Barb. (N. Y.) 504; *Ehle v. Moyer*, 8 How. Pr. (N. Y.) 244; *Delfendorf v. House*, 9 How. Pr. (N. Y.) 243.

⁴ *Cowell v. Buckelew*, 14 Cal. 641; *Thwing v. Thwing*, 9 Abb. Pr. (N. Y.) 323, 18 How. Pr. 458; *Lynde v. O'Donnell*, 12 Abb. Pr. (N. Y.) 286, 21 How. Pr. 34.

⁵ *Kirschner v. Dietrich*, 110 Cal. 502, 42 Pac. 1064.

⁶ See, ante, § 1116, footnotes 5 and 6.

⁷ *Hasewell v. Penman*, 2 Abb. Pr. (N. Y.) 230, 13 How. Pr. 114.

¹ *Gordon v. Sterling*, 13 How. Pr. (N. Y.) 405; *Gardner v. Walker*, 22 How. Pr. (N. Y.) 403.

² *Lachaise v. Libby*, 13 Abb. Pr. (N. Y.) 6, 7, 21 How. Pr. 362; *Buckman v. Brett*, 13 Abb. Pr. (N. Y.) 119.

³ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 385.

⁴ See: *Union Sav. Bank v. Barrett*, 132 Cal. 453, 454, 64 Pac. 713, 1071; *Daneri v. Gazzola*, 130 Cal. 416, 420, 73 Pac. 179; *De*

§ 1119. ——— DEATH OF DEFENDANT WIFE. In those cases in which the action is against husband and wife, for the debt of a wife contracted while a feme sole, it abates on her death, before judgment.¹ The death of a wife without issue living defeats a recovery by the husband in an action for the homestead.²

§ 1120. ——— OF APPELLANT. In action on a personal tort, on the death of appellant during an appeal from a judgment against him, the appeal may be continued by his representatives in their name.¹ In those cases in which a party dies after agreement and pending judgment upon appeal, this does not constitute a ground for delaying decision or departing from the ordinary course of procedure. Judgment may be entered, but it should be entered as of a day anterior to appellant's death;² although the Indiana Supreme Court has declared its opinion that a judgment of an appellate court rendered on an appeal, made in the name of a dead plaintiff, is void.³

§ 1121. ——— SUGGESTION OF DEATH. It is regular and proper to suggest the death of a party to an action in any court, and at any stage of the proceedings, and the death of a party occurring before the appeal taken may be shown in the appellate court by affidavit of the fact.¹ But it has been said that in those cases in which

Leonis v. Walsh, 140 Cal. 175, 179, 73 Pac. 813.

¹ Williams v. Kent, 15 Wend. (N. Y.) 360.

² Gee v. Moore, 14 Cal. 472.

¹ See: Miller v. Gunn, 7 How. Pr. (N. Y.) 159; Hastings v. McKinley, 8 How. Pr. (N. Y.) 175; Green v. Watkins, 19 U. S. (6 Wheat.) 260, 5 L. Ed. 256; McKinney v. Carroll, 37 U. S. (12 Pet.) 66, 9 L. Ed. 1002.

See discussion and authorities, ante, § 1109.

² Black v. Shaw, 20 Cal. 68; Savings & Loan Soc. v. Gibb, 21 Cal. 595, 609; Macon, City of, v. Dasher, 90 Ga. 195, 197, 16 S. E. 75; Teske v. Dittberner, 70 Neb. 559, 113 Am. St. Rep. 802, 98 N. W. 62.

³ Taylor v. Elliott, 52 Ind. 590.

¹ Judson v. Love, 35 Cal. 463; Shartzler v. Love, 40 Cal. 96; Taylor v. Western Pac. R. Co., 45 Cal. 337; Coffin v. Edgington, 2 Idaho (West Pub. Co. ed.) 595, 596, 23 Pac. 80; Wood v. Watson, 107 N. C. 52, 55, 12 S. E. 49.

the party has been dead so long that the action can not be revived without the consent of the parties, if such consent is not given the action abates.²

§ 1122. DURESS AND MENACE—AS TO WHAT AMOUNTS TO. Duress may be of (1) the person or (2) of the property. Duress of the person is personal restraint, or fear of personal injury or imprisonment.¹ There are various forms of duress of the property. Where a party in control of the property of another refuses to surrender the possession and use to the owner, except upon the compliance by such owner with an unlawful demand—e. g., the payment of money or the execution of a contract, and the like,—in compliance with which unlawful demand the owner makes in order to emancipate his property, when the act is done under protest, this amounts to duress of property, and the money paid or contract entered into is deemed to have been done compulsorily or under duress;² for there are situations and occasions when, although there is a legal remedy, a person's situation, or the condition and situation of the property, is such that the legal remedy would not be adequate to protect him from irreparable loss, injury or prejudice, and where the circumstances and the necessity to protect himself or his property may operate as a stress or coercion upon him to comply with the illegal demand.³ But to constitute the payment of money, or the execution of a contract, under

² New Hampshire Banking Co. v. Ball, 57 Kan. 812, 48 Pac. 137.

As to limitation of time for suggestion of death, see Phillips v. Preston, 52 U. S. (11 How.) 294, 13 L. Ed. 102.

¹ Hazelrigg v. Donaldson, 59 Ky. (2 Metc.) 445.

As to what constitutes duress generally, see McClair v. Wilson, 18 Colo. 82, 31 Pac. 502; Joannin v. Ogilvie, 49 Minn. 564, 32 Am. St. Rep. 581, 16 L. R. A. 376, 52

N. W. 217; Barrett v. Weber, 125 N. Y. 18, 25 N. E. 1068.

² Adams v. Schiffer, 11 Colo. 15, 7 Am. St. Rep. 202, 17 Pac. 21; Fergusson v. Winslow, 34 Minn. 384, 25 N. W. 942; De Graff v. Ramsey County, 46 Minn. 319, 48 N. W. 1135.

³ Fergusson v. Winslow, 34 Minn. 384, 25 N. W. 942; State v. Nelson, 41 Minn. 25, 42 N. W. 548; Mearkle v. Hennepin County, 44 Minn. 546, 47 N. W. 165; De Graff

such circumstances, duress, there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, or the contract, from which there is no other immediate means of relief than by advancing the money or executing the contract.⁴ On the other hand, it is well settled that the mere refusal of a party to pay a debt, or to perform a contract, is not duress, so as to avoid a contract procured by means of such refusal, although the other party was influenced in entering into it by his financial necessities.⁵ That is to say, to be regarded as paid or made under duress, the act must be made or done to relieve the person or property from an actual and existing duress imposed by the party to whom the money is paid, or in whose favor the contract is made,⁶ and, as Judge Dillon well remarked, such payment or contract "must not simply have been an unwilling, but a compulsory one, and the compulsion must have been illegal, unjust, and oppressive."⁷ Money paid under moral coercion or compulsion to obtain one's own property detained, is paid under duress.⁸ All money paid under duress may be recovered back,⁹ and a contract entered into under

v. Ramsey County, 46 Minn. 319, 48 N. W. 1135; Ocean Steamship Nav. Co. v. Tappan, 16 Blatchf. 297.

⁴ Brumagim v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; Joannin v. Ogilvie, 49 Minn. 564, 32 Am. St. Rep. 581, 16 L. R. A. 376, 52 N. W. 217; Radich v. Hutchins, 95 U. S. 210, 24 L. Ed. 409.

⁵ MICH.—Hackley v. Headley, 45 Mich. 569, 8 N. W. 511; Goebel v. Linn, 47 Mich. 489, 41 Am. St. Rep. 723, 11 N. W. 284. MINN.—Cable v. Foley, 45 Minn. 421, 47 N. W. 1135. PA.—Miller v. Miller, 68 Pa. St. 486. FED.—Silliman v. United States, 101 U. S. 465, 25

L. Ed. 987, affirming 12 Ct. of Cl. 433.

⁶ Vick v. Shinn, 49 Ark. 70, 4 Am. St. Rep. 26, 6 S. W. 60; Elston v. Chicago, City of, 40 Ill. 514, 89 Am. Dec. 361; Baltimore, City of, v. Lefferman, 4 Gill (Md.) 425, 45 Am. Dec. 145.

See, also, notes 45 Am. Dec. 153-171; 89 Am. Dec. 366; 51 Am. St. Rep. 820-833; 16 L. R. A. 376.

⁷ Dickerman v. Lord, 21 Iowa 338.

⁸ Chamberlain v. Reed, 13 Me. 357, 29 Am. Dec. 506.

⁹ Fergusson v. Winslow, 34 Minn. 384, 29 N. W. 542; Joannin v. Ogilvie, 49 Minn. 564, 32 Am. St.

duress can not be enforced, either at law or in equity, where such duress is pleaded as a defense.

Duress of imprisonment is where a man actually loses his liberty. If a man be legally deprived of his liberty until he sign and seal a bond, or the like, he may allege this duress and avoid the bond.¹⁰ But if a man be legally imprisoned, and, either to procure his discharge or on any other fair account, seal a bond or deed, this is not by duress of imprisonment, and he is not at liberty to avoid it.¹¹

Duress per minas, which is either for fear of loss of life or else for fear of mayhem or loss of limb, must be upon sufficient reason.¹² Lord Coke adds to these, fear of imprisonment.¹³ In order to avoid a note on the ground that it was procured by menace of arrest or imprisonment, it must appear that the menace was of unlawful imprisonment, and that the maker was put in fear of such imprisonment, and was thereby induced to execute it.¹⁴ An abuse of process against the person to compel a party to do any act against his will is a duress, and the act done may be avoided.¹⁵ It is not legal duress to threaten to or actually take advantage of the usual remedy by suit for the enforcement of a debt or obligation, even if the claim be illegal.¹⁶ It has been held that a restraint of goods under

Rep. 564, 16 L. R. A. 376, 52 N. W. 217; *Peters v. Railroad Co.*, 42 Ohio St. 275, 51 Am. St. Rep. 814.

Illegal rates required by railroad in order to secure transportation of goods, may be recovered back, even though the arrangement was to pay monthly.—*Peters v. Railroad Co.*, 42 Ohio St. 275, 51 Am. Rep. 814.

¹⁰ *Craig v. Ward*, 9 Johns. (N. Y.) 197, 201; *Elliott v. Swartwout*, 35 U. S. (10 Pet.) 137, 9 L. Ed. 373.

¹ Code Pl. and Pr.—94

¹¹ *Hollingsworth v. Napier*, 3 Cal. 168; *Eddy v. Herrin*, 17 Me. 338, 35 Am. Dec. 261; *Watkins v. Baird*, 6 Mass. 54, 4 Am. Dec. 170. See 2 Coke Inst. 482.

¹² 1 Bl. Com. 131.

¹³ 2 Coke Inst. 483.

¹⁴ *Knapp v. Hyde*, 60 Barb. (N. Y.) 80; *Landa v. Obert*, 47 Tex. 539.

¹⁵ *Breck v. Blanchard*, 22 N. H. 303.

¹⁶ *Holt v. Thomas*, 105 Cal. 273, 38 Pac. 891.

circumstances of hardship will avoid a contract.¹⁷ In the case of violence or threats, the age, sex, state of health, etc., must be taken into consideration; and they are grounds of avoiding the contract not only when they are exercised on the contracting party in person, but when the wife, the husband, the descendants or ancestors of the party are the object of them. Duress can not be pleaded by a stranger.¹⁸

§ 1123. ——— IN CALIFORNIA: MENACE. Duress, as defined by the California code consists in: (1) Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife; (2) unlawful detention of the property of any such person; or (3) confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.¹

Menace may constitute a form of duress in law which will relieve from a liability, and in California consists in a threat: (1) Of duress such as is specified in clauses one and three in the first part of the code section; (2) unlawful and violent injury to the person or property of the party as specified in the first part of the section; or (3) of any injury to the character of any such person;² and where it exists destroys consent and relieves from liability.³

§ 1124. ——— ESSENTIAL ALLEGATIONS. When duress is relied on as a defense, it must be specially pleaded, otherwise on the trial evidence of the facts constituting the duress or threats will not be admissible.¹ An answer

¹⁷ *Craig v. Ward*, 9 Johns. (N. Y.) 197; *Elliott v. Swartwout*, 35 U. S. (10 Pet.) 137, 9 L. Ed. 373.

Compare: *Hazelrigg v. Donaldson*, 59 Ky. (2 Metc.) 445; *Maissonaire v. Keating*, 2 Gall. 335, 337, Fed. Cas. No. 8978.

¹⁸ *McClintick v. Cummins*, 3 McL. 158, Fed. Cas. No. 8699.

¹ *Kerr's Cyc. Cal. Civil Code*, § 1569.

² *Id.*, § 1570.

³ See, *Id.*, § 1565.

¹ *Nordholt v. Nordholt*, 87 Cal. 552, 556, 22 Am. St. Rep. 268, 29

setting up duress must in general aver the facts constituting the duress. Thus, if a trust is executed by a deed made in pursuance thereof, the execution of which is admitted, it can not be proved that it was made under duress, unless the duress is specially pleaded as affirmative matter in avoidance of the deed.³

§ 1125. — FORMER JUDGMENT—DISMISSAL ON MERITS.

In those cases in which the complaint is dismissed upon the merits, the judgment of dismissal, without a stipulation against prejudice, bars a fresh action, especially where the complaint is in equity.¹ Dismissal of suit to obtain probate of a will is no bar to introduction of evidence to show its fraudulent destruction, to establish title in partition.² But judgment of dismissal of premature suit is no bar to a fresh action on the demand, when matured.³ So, also, dismissal on ground of want of capacity to sue is no bar to subsequent action legally instituted.⁴ And when dismissal of complaint is relied upon in bar, it must be shown that it was a judicial determination of the same point.⁵ Ordinarily, when an action is dismissed without any judicial determination of the controversy, it is no bar to another suit.

Pac. 599. See: *McComb v. Reed*,
25 Cal. 281, 87 Am. Dec. 115;
Miller v. Sharp, 48 Cal. 394; *Mc-
Creary v. Duane*, 52 Cal. 262; *Mc-
Creary v. Marston*, 56 Cal. 403.

² *Nordholt v. Nordholt*, 87 Cal.
422, 22 Am. St. Rep. 268, 26 Pac.

429.

³ *Bostwick v. Abbott*, 40 Barb.
(N. Y.) 331, 16 Abb. Pr. 417; *Kel-
ley v. Murphy*, 26 Pa. St. 78; *West-
cott v. Edmonds*, 68 Pa. St. 34;
Welchley v. Coffman, 144 Pa. St.
489, 27 Am. St. Rep. 667, 22 Atl.
919.

Must be upon the merits, to be a

bar.—*Pepper v. Donnelly*, 87 Ky.
259.

² *Harris v. Harris*, 26 N. Y. 433.

³ *Wilcox v. Lee*, 24 N. Y. Super.
Ct. Rep. (1 Rob.) 355, 1 Abb. Pr.
N. S. 250, 26 How. Pr. 418.

⁴ *Robbins v. Wells*, 24 N. Y.
Super. Ct. Rep. (1 Rob.) 666, 18
Abb. Pr. 191, 26 How. Pr. 15.

⁵ *Smith v. Ferris*, 1 Daly (N. Y.)
18. See: *Solly v. Clayton*, 12
Colo. 30, 20 Pac. 351; *Bell v. Mer-
rifield*, 109 N. Y. 202, 4 Am. St.
Rep. 436, 14 N. Y. Civ. Proc. Rep.
146, 16 N. E. 55; *Gallaher v.
Moundville, City of*, 34 W. Va. 730,
26 Am. St. Rep. 942, 12 S. E. 859.

§ 1126. — — — ALLEGATIONS ESSENTIAL.—As to JUDGMENT. In those cases when a former judgment is relied on as a bar to an action, it is generally necessary to allege that the former judgment is in full force, but it may sufficiently appear by implication.¹ In California, it is not necessary that the plea state that the former judgment has not been appealed from, nor that it has become final.² In Indiana³ and Iowa⁴ such a plea must be accompanied with an exhibit of the record. A plea can not contradict the record of a former suit. Errors in the original suit could have been corrected as they occurred.⁵ Where a judgment in a prior suit is set up in defense to an action, a complete record of all the pleadings and proceedings in the case in which it was rendered should be made part of the answer.⁶ Either the term of the court at which the former judgment was recovered, or the exact date of the entry of the judgment, should be stated, and when taken on vacation, the time of its entry by the clerk should be stated.⁷ The rule that a decree must be enrolled before it can be pleaded in a bar of a second bill for the same matter is not applicable to a case where the bill is filed to impeach a decree on the ground of fraud.⁸ A judgment in a former suit between the same parties, for the same cause, and in the same form is a bar to any other suit.⁹ But such judgment must be specially pleaded.¹⁰

¹ Southern Life Ins. & Trust Co.

Davis, 4 Edw. Ch. (N. Y.) 588.

² Baird, In re, 84 Cal. 95, 24 Pac. 167.

³ Adkins v. Hudson, 19 Ind. 392.

⁴ Lee v. Kelster, 11 Iowa 480.

⁵ Hall v. Singer, 3 McL. 17, Fed. Cas. No. 5946.

⁶ Williamson v. Foreman, 23 Ind. 540; Ringle v. Weston, 25 Ind. 38.

⁷ Mount v. Scholes, 120 Ill. 394, N. E. 401.

⁸ Pearse v. Dobinson, L. R., 1 Eq. 4.

⁹ McKnight v. Taylor, 1 Mo. 282.

¹⁰ CAL.—Love v. Waltz, 7 Cal. 250; Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692; Vance v. Olinger, 27 Cal. 358; Marshall v. Shafter, 32 Cal. 176; Wiese v. San Francisco Musical Soc., 82 Cal. 645, 646, 7 L. R. A. 577, 23 Pac. 212. IND.—Richardson v. Hickman, 22 Ind. 244. N. Y.—Brazil v. Isham, 12 N. Y. 17. TEX.—Racke v. Anheuser-Busch Brewing Assoc., 17 Tex. Civ. App. 167, 170, 42 S. W. 774. FED.—Welsh v. Lindo, 1 Cr. C. C. 580, Fed. Cas. No. 17409.

For evidence of a former recovery for the same cause of action can not be given in any action whatever, under an answer containing only denials of the complaint, or an allegation of the pendency of another action.¹¹ The rule of the old practice, permitting such evidence to be given under the general issue in actions of ejectment and trover,¹² is abrogated by the Code.¹³ If there is no opportunity to plead it, it may be put in evidence.¹⁴ It may be pleaded in an equity suit.¹⁵

Under the California practice, a decree in equity may be pleaded in bar to a subsequent action at law.¹⁶ We have already seen the former judgment or decree must be specially pleaded before it can be availed of; but whether pleaded or not, it must be proved in evidence,¹⁷ because the court can not take judicial notice of the record of another action in the same court without the formal introduction of the record thereof in evidence, nor can it take notice of the existence of a record not introduced in evidence in the court below,¹⁸ even though the record of the former cause is annexed to the pleading.¹⁹ But the

See, however, post, § 1132, footnote 1.

¹¹ *Hendricks v. Decker*, 35 Barb. (N. Y.) 298.

¹² *Young v. Runnell*, 2 Hill (N. Y.) 478, 38 Am. Dec. 594, 5 Hill 61; *Miller v. Mannice*, 6 Hill (N. Y.) 125; *Wright v. Butler*, 6 Wend. (N. Y.) 284, 21 Am. Dec. 323; *Denison v. Seymour*, 9 Wend. (N. Y.) 9.

¹³ *Hendricks v. Decker*, 35 Barb. (N. Y.) 298.

¹⁴ *Flandreau v. Downey*, 23 Cal. 368; *Clink v. Thurston*, 47 Cal. 29.

¹⁵ *San Francisco, City of, v.*

Spring Valley Water Works, 39 Cal. 473, 482.

¹⁶ *Wolverton v. Baker*, 86 Cal. 591, 25 Pac. 54; *Philbrook v. Newman*, 148 Cal. 175, 82 Pac. 773.

Former judgment, properly pleaded, is a bar, although the former judgment was erroneous.—*Wolverton v. Baker*, 86 Cal. 591, 25 Pac. 54.

¹⁷ See footnote 10, this section.

¹⁸ *People v. De La Guerra*, 24 Cal. 73, 78.

¹⁹ *Id.*; *Glaze v. Bogle*, 105 Ga. 295, 31 S. E. 169; *Simon v. Durham*, 10 Ore. 52, 55; *Ollschlager's Estate*, 50 Ore. 59, 89 Pac. 1050; *Lownsedale v. Gray's Harbor Boom Co.*, 5 Wash. 547, 103 Pac. 835.

ar of the former judgment is a personal privilege, which may be waived, the same as any other personal privilege.²⁹

§ 1127. — — — — AS TO PARTIES. To be available as a bar, the former judgment must be in an action between the same parties, and if the parties are not the same, allegations to show their privity with the present parties must be inserted.¹ A judgment is conclusive of the issues involved as between the parties thereto, though in the action in which it is pleaded only some of the parties are litigants.² Thus, where the plaintiff assigned to S and R a certain promissory note given by the defendants for the purpose of bringing suit with other claims hereon and S and R brought suit thereon and recovered judgment against one defendant, it was held that such recovery could be set up in answer to a suit on the note by the plaintiff against all the defendants.³

§ 1128. — — — — EFFECT OF FORMER JUDGMENT—IN GENERAL. Where a court in a former action between the same parties had jurisdiction over the subject and the parties, and the questions of fact were the same as in the subsequent action, and were necessary to its decision, and either were or might have been litigated in the suit, and the final hearing was upon its merits, the judgment is res judicata as to all those things that were, or under the pleadings might have been, controverted in that action whose adjudication was necessary to the final disposition of the case.⁴ A judgment in a former action is well

²⁹ *Semple v. Ware*, 42 Cal. 619, 21; *Chicago Theological Seminary Board Directors v. People ex rel. Raymond*, 189 Ill. 439, 448, 9 N. E. 977; *Bateman v. Grand Rapids & I. R. Co.*, 96 Mich. 441, 44, 56 N. W. 28; *Ortiz v. First Nat. Bank*, 12 N. M. 528, 78 Pac. 81.

¹ *Goddard v. Benson*, 15 Abb. Pr. (N. Y.) 191.

² *Nave v. Adams*, 107 Mo. 414, 28 Am. St. Rep. 421, 17 S. W. 958.

³ *Anderson v. Yosemite Min. & Mill. Co.*, 9 Utah 420, 35 Pac. 502.

⁴ *Keene v. Clark*, 28 N. Y. Super. Ct. Rep. (5 Rob.) 38; *Graham v. Culver*, 3 Wyo. 639, 31 Am. St. Rep. 105, 29 Pac. 270, 30 Pac. 975.

See, also, note 31 Am. St. Rep. 121.

pleaded as a bar in a second action, provided the cause of action is the same, though the form of action has been changed.² The cause of action is said to be the same as that in a former suit, where the same evidence would support both actions.³ Recovery of judgment against a firm upon a contract fraudulently induced by one member is no bar to an action against that member for the fraud.⁴ If parties go to trial on a plea of former recovery in an attachment execution, with a replication, this does not amount to a confession of the truth of the facts stated in the plea.⁵

§ 1129. — — — — — WHERE NO EVIDENCE WAS OFFERED. The general rule has been said to be that the judgment or decree of a court of competent jurisdiction is not only final as to the matter actually determined, but as to every other matter which the parties might have litigated and

² Taylor v. Castle, 42 Cal. 367; Mauldin v. Clark, 79 Cal. 51, 53, 21 Pac. 361; Wolvorton v. Baker, 98 Cal. 623, 632, 33 Pac. 731.

³ CAL.—Taylor v. Castle, 42 Cal. 367; Montgomery v. Harrington, 58 Cal. 270, 274 (applying principle to plea of another action pending); Phelan v. Quinn, 130 Cal. 374, 378, 62 Pac. 623; Page v. Garver, 5 Cal. App. 383, 387, 90 Pac. 481. IND.—Baker v. State, 109 Ind. 47, 60, 9 N. E. 711 (judgment in supplemental proceedings bar to execution against body); Brooke v. Logan, 112 Ind. 183, 186, 2 Am. St. Rep. 180, 13 N. E. 669 (aliter as to judgment denial of removal of guardian and subsequent habeas corpus proceeding). MICH.—McKinney v. Curtiss, 60 Mich. 611, 621, 27 N. W. 691 (adjudication on probate claim a bar). NEB.—Gayer v. Parker, 24 Neb. 643, 644, 8 Am. St. Rep. 227, 39 N. W. 845 (different proof re-

quired, former judgment no bar). ORE.—Hammer v. Downing, 39 Ore. 504, 528, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30. WASH.—Buddress v. Schafter, 12 Wash. 310, 312, 41 Pac. 43 (no bar where proof required different). FED.—Stone v. United States, 64 Fed. 671 (acquittal on charge of feloniously removing timber from public lands, no bar to subsequent suit to recover value of timber); Water, Light & Gas Co. v. Hutchinson, City of, 60 C. C. A. 547, 19 L. R. A. (N. S.) 219, 160 Fed. 41 (claim different, former judgment no bar, unless matters actually litigated).

⁴ Goldberg v. Dougherty, 39 N. Y. Super. Ct. Rep. (7 Jones & S.) 189.

As to actions ex delicto, see Atlantic Dock Co. v. New York, City of, 53 N. Y. 64.

⁵ Tams v. Bullitt, 35 Pa. St. 308.

had decided under the pleadings.¹ This is probably too broad a statement of the rule. The rule is thought to be more correctly stated by an early New York case,² in which the general declaration embraced several causes of action. It was held that the plaintiff in a second suit may show that he "offered" no evidence as to one of the causes, and that the cause went to the jury upon a different part of his claim from that for which his second suit is brought, in which case the judgment in the first will be no bar for the second. But where he attempts to give evidence, and submits the question to the jury without withdrawing any part of his claim, the defendant may insist upon the first judgment as a bar.³

§ 1130. — — — — — WHEN A BAR. A former judgment rendered in an action tried upon its merits, between the same parties, and upon the same subject-matter, is, if properly pleaded, an effectual bar to another action between the same parties on the same cause; but it is no defense to a cause of action accrued after the rendition of said judgment.¹ Where the same subject-matter has been fairly put in issue and once tried upon the merits, it can not be again litigated, and a former judgment is a bar so long as it remains unreversed.² The fact that a judgment in a former action between the same parties, which determined the same points as those raised in the latter action, was erroneous under the law as subsequently declared by the appellate court in other cases between

¹ *La Guen v. Gouverneur*, 1 Johns. Cas. (N. Y.) 436, 1 Am. Dec. 121; approved in *Simons v. Hart*, 14 Johns. (N. Y.) 77; *Southgate v. Montgomery*, 1 Pal. Ch. (N. Y.) 47; *Bruen v. Hone*, 3 Barb. (N. Y.) 586, 596.

² *Miller v. Manice*, 6 Hill (N. Y.) 121.

³ *Barnum v. Reynolds*, 33 Cal. 643.

¹ *Jones v. Petaluma, City of*, 36 Cal. 230; *Barnum v. Reynolds*, 33 Cal. 643.

² *San Francisco, City of, v. Spring Valley Water Works*, 39 Cal. 473; *Etcheborne v. Auzerais*, 45 Cal. 121; *Rahm v. Minis*, 40 Cal. 422; *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202, 28 N. E. 841; *McKnight v. Taylor*, 1 Mo. 282.

other parties, does not affect its force as an adjudication of the rights of the parties thereto, and those in privity with them.³

*A judgment in a justices' court for damages caused by the alleged diversion of a stream of water is a bar to a subsequent action in the Superior Court involving the same issues.*⁴ Adjudication in a former suit is conclusive as to the defense then existent, but not so as to another subsequently arising, and which could not then have been interposed.⁵

§ 1131. — — — — — WHEN NOT A BAR. A judgment in a former action is not a bar in a subsequent action, although the pleadings present the same matter, if it appears either by the record, or, it seems, by extraneous evidence, that the matter in question was not litigated, and actual evidence was not given as to it, and it was not submitted to the court, but that the trial and verdict proceeded upon other grounds.¹ A decree dismissing a bill for matters not involving merits is no bar to a subsequent suit.² A judgment against one of two several obligors without satisfaction is no bar to an action against the other.³ In an action against an infant for damages, a judgment of discontinuance in a former action for the

³ *People ex rel. Bryant v. Holliday*, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 186; *Case v. Beauregard*, 101 U. S. 688, sub nom. *Case v. New Orleans & C. R. Co.*, 25 L. Ed. 1004, affirming 2 Woods 236, Fed. Cas. No. 2493.

⁴ *Boyer v. Scofield*, *41 N. Y. (2 Keyes) 628, 1 Abb. Ct. App. Dec. 177.

⁵ *Smith v. McCluskey*, 45 Barb. (N. Y.) 610.

In California this matter is regulated by a special provision of the procedural code.—See *Kerr's Cyc. Cal. Code Civ. Proc.*, § 1908.

See, in connection with the code provision, *Leese v. Sherwood*, 21 Cal. 164; *Miller v. Van Tassel*, 24 Cal. 466; *Boggs v. Clark*, 37 Cal. 238; *Ford v. Doyle*, 44 Cal. 635.

¹ *Burwell v. Knight*, 51 Barb. (N. Y.) 267.

² See: *Tutton v. Addams*, 45 Pa. St. 67; *Hughes v. United States*, 71 U. S. (4 Wall.) 232, 18 L. Ed. 303.

³ *Fitzgerald v. Burke*, 14 Colo. 559, 23 Pac. 993; *Armstrong v. Prewett*, 5 Mo. 476, 32 Am. Dec. 338; *Hix v. Davis*, 68 N. C. 233.

same cause brought in the court of a justice of the peace, the judgment being rendered on the ground that the defendant was an infant and no guardian had been appointed, is no bar. A justice has no jurisdiction to proceed against an infant defendant, after the return of process, until a guardian has been appointed.⁴ When the court rendering judgment has failed to acquire jurisdiction over the person or subject-matter in controversy, its action is null, and no bar to future proceeding.⁵ So, also, where such court has not exercised its jurisdiction within the limits imposed by statute.⁶

§ 1132. — — — — — WHEN AN ESTOPPEL. If on the case made by the complaint, the defendant is not called upon or has no opportunity to plead a former judgment as an estoppel, it may be received in evidence as matter of estoppel without having been pleaded.¹ A judgment to operate as an estoppel must be a judgment of a court of competent jurisdiction, upon the same subject-matter, in a cause regularly tried on its merits, upon issue duly joined by proper pleadings in such court, between the same parties or their privies.² A judgment in a collateral proceeding does not estop;³ and in a cause in which there were several grounds of defense; if there is no means of determining upon which of these several grounds the judgment was based, the judgment will not be conclusive

⁴ Harvey v. Large, 51 Barb. (N. Y.) 222.

⁵ Porter v. Bronson, 19 Abb. Pr. (N. Y.) 236; Sagendorph v. Shult, 41 Barb. (N. Y.) 102; Gage v. Hill, 43 Barb. (N. Y.) 44; Hardy v. Beaty, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778.

⁶ Bloomer v. Merrill, 1 Daly (N. Y.) 485, 29 How. Pr. 259.

¹ Jackson v. Lodge, 36 Cal. 28; Clink v. Thurston, 47 Cal. 29; Wixson v. Devine, 67 Cal. 311, 7 Pac. 776.

See, however, ante, § 1126, footnote 10.

A former recovery by the plaintiff operates by way of estoppel on the defendant, and can not properly be pleaded.—Wixson v. Devine, 67 Cal. 341, 7 Pac. 776. See: Flandreau v. Downey, 23 Cal. 358; Clink v. Thurston, 47 Cal. 30.

² Boggs v. Clark, 37 Cal. 236; Silva v. Hawkins, 152 Cal. 139, 92 Pac. 73.

³ See Dickerson v. Davis, 111 Ind. 433, 439, 12 N. E. 145.

upon any of the grounds set up.⁴ Suffering judgment for whole amount claimed by plaintiff held to estop defendant from bringing subsequent suit for an omitted credit, which he might have set up as a defense;⁵ and recovery of part of an entire demand estops any suit being brought for the residue.⁶ Disallowance of claim, as set-off in one action, estops another action being brought for it,⁷ and a similar effect is given where a demand is set up by way of counter-claim.⁸ A judgment obtained pendente lite in an action previously brought may operate as an estoppel.⁹ In a case in which plaintiff introduced the judgment-roll in another action, in which the title to the premises sought to be recovered was adjudged to be in him, a verdict was thereupon directed to be entered for him; defendant's motion for a new trial on exceptions was overruled. Afterwards the court of appeals reversed so much of the former judgment as adjudged the title to the land to be in the plaintiff. The order denying defendant's motion for a new trial, and the judgment entered on the directed verdict were set aside, and a reargument of the remaining exceptions granted.¹⁰

§ 1133. ——— FOREIGN ADJUDICATION — ESSENTIAL ALLEGATIONS. In those cases in which the defendant relies upon proceedings under the statute of another state, he must set out the statute, that the court may see whether the proceedings were warranted by the statute or not; and the general allegation that the proceedings were pursuant to the statute is not sufficient.¹ A plea which sets up a

⁴ *Campbell v. Rankin*, 2 Mont. 363, 369.

⁵ *Binck v. Wood*, 43 Barb. (N. Y.) 315.

⁶ *Hopf v. Myers*, 42 Barb. (N. Y.) 270; *Bancroft v. Winspear*, 44 Barb. (N. Y.) 209.

⁷ *Rogers v. Rogers*, 1 Daly (N. Y.) 194.

⁸ *Collyer v. Collins*, 17 Abb. Pr. (N. Y.) 467.

⁹ *Bank of Beloit v. Beal*, 11 Abb. Pr. (N. Y.) 375, 20 How. Pr. 331; affirmed in 20 N. Y. Super. Ct. Rep. (7 Bosw.) 611, which was affirmed in 34 N. Y. 473.

¹⁰ *Gilchrist v. Comfort*, 26 How. Pr. 394; affirmed 34 N. Y. 235.

¹ *Walker v. Maxwell*, 1 Mass.

foreign judgment must contain an allegation that the court had jurisdiction, or so much of the proceedings must be spread on the record as will show affirmatively that the court has jurisdiction.² Judgment of a foreign tribunal having full cognizance of the same controversy is conclusive upon the merits,³ and only impeachable for want of jurisdiction or fraud.⁴ A plea which sets up in bar of an action upon a contract that property was attached in a previous suit to answer for the same demand, and was lost, should show how the loss occurred.⁵

§ 1134. — FRAUD — ESSENTIAL AVERMENTS — FALSE REPRESENTATIONS. In those cases in which the defendant alleges, for his defense to an action, upon fraud and deceit or false representations, the defense must be especially pleaded,¹ by setting up the facts and circumstances showing the fraud or false representations relied upon,² and

¹ *Holmes v. Broughton*, 10 Wend. (N. Y.) 75, 25 Am. Dec. 536.

² *Burnham v. Webster, Davies*, 6, 2 Ware 240, Fed. Cas. No. 78.

³ See *Taylor v. Shew*, 39 Cal. 9, 2 Am. Rep. 478, holding that an action may be maintained on a foreign judgment, even though the case has been appealed, and is pending in the appellate court.

⁴ *Lazier v. Westcott*, 26 N. Y. 6, 82 Am. Dec. 404; *Phillips v. Jeffrey*, 20 N. Y. Super. Ct. Rep. (Bosw.) 150; *Jarvis v. Sewall*, Barb. (N. Y.) 449.

⁵ For plea of fraud in the adjudication under which plaintiff claimed, see *Southern Life Ins. & Trust Co. v. Davis*, 4 Edw. Ch. (L. Y.) 588.

For an insufficient plea of attachment in former action, see *New England Screw Co. v. Bliven*, Blatchf. 240, Fed. Cas. No. 156.

Compare: *Stone v. Stone*, 3 Cr. C. C. 119, Fed. Cas. No. 13488.

Plea of former adjudication, what defense may be presented.—*Welsh v. Lindo*, 1 Cr. C. C. 508, Fed. Cas. No. 17409.

⁶ *Starr v. Moore*, 3 McL. 354, Fed. Cas. No. 13315.

¹ *Hammond v. McCullough*, 159 Cal. 639, 115 Pac. 216; *Duncan v. Duncan*, 6 Cal. App. 404, 92 Pac. 310; *De Votie v. McGerr*, 15 Colo. 467, 22 Am. St. Rep. 426, 24 Pac. 923.

See, also, cases next footnote.

² CAL.—*Lamontt v. Butler*, 18 Cal. 32; *People ex rel. Central Pac. R. Co. v. San Francisco Supervisors*, 27 Cal. 655; *Gifford v. Carville*, 29 Cal. 589; *Albertoli v. Branham*, 80 Cal. 631, 13 Am. St. Rep. 200, 22 Pac. 404; *Woodruff v. Howes*, 88 Cal. 184, 26 Pac. 111. COLO.—*De Votie v. McGerr*, 15 Colo. 467, 22 Am. St. Rep. 426, 24 Pac. 923; *Jain v. Giffin*, 3 Colo.

not plead the defense merely by a verbal characterization of the transaction;³ the use of the words "fraud," "fraudulent," and the like in a pleading setting up fraud does not enlarge the meaning of the facts pleaded,⁴ and its use disassociated with any facts is the mere pleading of a conclusion of the pleader⁵ or of law.⁶ Thus, an answer setting up fraud or deceit as a defense to an action on a promissory note should show damage therefrom and the extent thereof.⁷ A chattel mortgage, made the basis of an action, if fair upon its face, can not be impeached for fraud unless the facts relied on to constitute the fraud are pleaded in the answer.⁸ In a case in which fraud was set up without specifying in what the fraud consisted, held to be on insufficient plea.⁹ Title resting upon fraud, the fraud must be specially pleaded,¹⁰ and the alleged fraudulent conduct of the plaintiff, being the source and foundation of the defendant's claim and defense, is essentially new matter,¹¹ it must be specially pleaded or it can not be proven.¹² Yet it has been held to be sufficient to allege in an answer that conveyance was made with intent to delay and defraud the grantor's creditors.¹³ Mere constructive fraud is not sufficient, at all events after long delay.¹⁴ An answer seeking to avoid a con-

App. 90, 32 Pac. 80. MONT.—
Truro v. Passmore, 38 Mont. 544,
100 Pac. 966. UTAH—Parley's
Park Silver Min. Co. v. Kerr, 3
Utah 235, 2 Pac. 709; affirmed 130
U. S. 256, 32 L. Ed. 906, 9 Sup. Ct.
Rep. 511; Rasmussen v. McKnight,
3 Utah 315, 3 Pac. 83, 4 Pac. 526.

See, however, footnote 18, this
section, and text going therewith.

³ See Gill v. Manhattan Life
Ins. Co., 11 Ariz. 232, 95 Pac. 89.

⁴ Evert v. Tower, 51 Wash. 514,
21 L. R. A. (N. S.) 950, 99 Pac. 580.

⁵ See, ante, § 714.

⁶ See, ante, § 715.

⁷ Parker v. Jewett, 52 Minn. 514,
55 N. W. 56.

⁸ Brereton v. Bennett, 15 Colo.
254, 25 Pac. 310; West Coast Gro-
cery Co. v. Stinson, 13 Wash. 55,
43 Pac. 35.

⁹ Bennett v. Reef, 16 Colo. 431,
27 Pac. 252.

¹⁰ See authorities in footnote 1,
this section.

¹¹ As to new matter generally,
see, post, §§ 1170 et seq.

¹² De Votie v. McGerr, 15 Colo.
467, 22 Am. St. Rep. 426, 24 Pac.
923.

¹³ See Reese v. Kinkad, 20 Nev.
65, 14 Pac. 871; Probert v. McDon-
ald, 2 S. D. 495, 51 N. W. 212.

¹⁴ Patch v. Ward, L. R., 3 Ch.
203.

tract, by reason of fraudulent misrepresentations of the plaintiff in procuring it, must state in what the misrepresentations consisted, and they must be of matter of fact of which defendant was ignorant, and not of law.¹⁵ False representations in respect to the profitable nature of a business carried on upon leased premises, whereby defendant was induced to guarantee the rent, may be set up as a defense to an action on his guarantee;¹⁶ the answer was held fatally defective in not charging the representations to have been fraudulently made or that there was a warranty of some particular quantity.¹⁷ To set aside for fraud a decree signed and enrolled, actual, positive fraud must be shown. An answer alleging that a judgment relied on by the plaintiff was obtained by fraud and collusion between parties named is sufficiently definite and certain, without specifying the acts which show fraud and collusion.¹⁸ An answer presents a good defense to an action which is brought on the ground of fraud, if it states circumstances from which it can be reasonably inferred that the fraud charged could not have been practiced.¹⁹

Answer containing a general allegation of fraud, if the plaintiffs go to trial upon the issue thus joined, without taking any exception to the answer on the ground of insufficiency, and there is no objection made by the plain-

¹⁵ *People ex rel. Central Pac. R. Co. v. San Francisco Supervisors*, 27 Cal. 655; *Holdredge v. Webb*, 64 Barb. (N. Y.) 9.

¹⁶ *Kowing v. Manley*, 49 N. Y. 192, 10 Am. Rep. 346, 13 Abb. Pr. N. S. 276, reversing 57 Barb. 479; *Dorris v. French*, 4 Hun (N. Y.) 292, 6 Thomp. & C. 581; *Swords v. Owen*, 34 N. Y. Super. Ct. Rep. (2 Jones & S.) 277, 43 How. Pr. 176; *Mendelson v. Stout*, 37 N. Y. Super. Ct. Rep. (5 Jones & S.) 656; *Donovan v. Compagnie, Gen-*

erale Trans-Atlantic, 39 N. Y. Super. Ct. Rep. (7 Jones & S.) 519.

In California, what constitutes vitiating fraud is regulated by statute.—See Kerr's Cyc. Cal. Civ. Code, §§ 1571-1574. See, also, *Leszinsky v. White*, 45 Cal. 278.

¹⁷ *Kinney v. Osborne*, 14 Cal. 112.

¹⁸ *Calver v. Hollister*, 17 Abb. Pr. (N. Y.) 405, 29 How. Pr. 479.

Compare: Authorities in footnote 2, this section.

¹⁹ *Burk v. Stewig*, 21 Tex. 418.

tiffs to the testimony introduced by defendants in support of the issue of fraud, an objection to the answer on the ground that it does not contain a statement of the particular facts and circumstances constituting the alleged fraud, can not be entertained by the Supreme Court on appeal.²⁰

§ 1135. — **INFANCY OF DEFENDANT—ESSENTIAL ALLEGATIONS.** In all cases in which a personal disability is claimed and relied on as a defense to the action,—e. g., infancy, insanity, and the like,—the facts relating to or causing such disability should be specially pleaded; because, in general, unless so pleaded the disability relied on can not be proved,¹—although an admission by an infant will not affect his rights,² and it has been said that no advantage can be taken of the failure of an infant to plead, it being the duty of the court to consider as formally pleaded every defense to an action against an infant which might be made for him;³ and this would of course include the defense of the disability of infancy.

§ 1136. — **MARRIAGE—OF PLAINTIFF—ESSENTIAL ALLEGATIONS: EFFECT OF DIVORCE.** Where the disability of the plaintiff, who is a married woman, does not appear upon the face of the complaint, the defendant, if he intends to avail himself of the coverture as a defense to the action, should set it up in his answer. Such objection is waived by a general denial.¹ In an action on contract against a

²⁰ King v. Davis, 34 Cal. 100; Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386; Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497.

¹ Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142; Mott v. Burnett, 2 E. D. Smith (N. Y.) 50, modifying 1 N. Y. Code Rep. (N. S.) 226; Roe v. Angevine, 7 Hun (N. Y.) 679; Young v. Bell, 1 Cr. C. C. 342, Fed. Cas. No. 18152.

² Barker v. Hamilton, 3 Colo. 291.

³ Turner v. Short (Ky.), 4 S. W. 347.

¹ Dillaye v. Parks, 31 Barb. (N. Y.) 132; Belville v. Cox, 109 N. C. 265, 13 S. E. 800.

In California, matter is regulated by the procedural code.—Kerr's Cyc. Cal. Code Civ. Proc., 2d ed., § 370; Consolidated Supp. 1906-1913, p. 1408.

married woman, in those states in which she may enter into any contract, the same as if she were sole, a plea of coverture, without more, is not sufficient in law as a defense.² In plea of coverture in abatement, the allegations recognized as necessary are, that of coverture at the time of the commencement of the action and its continuance by the continued life of the husband up to the time of filing the plea.³

An action brought in the names of husband and wife to recover wife's separate estate, does not abate in consequence of divorce and subsequent marriage of wife with another.⁴ Where the husband and wife are joined as plaintiffs, and the contract sued on and set forth in the complaint was made between the husband only and the defendants, the name of the wife was mere surplusage, and not a defect of parties under the Code, and might have been stricken out on notice, if insisted upon.⁵

§ 1137. — — — OF DEFENDANT—EFFECT OF: CHARGING SEPARATE ESTATE. The marriage of a female defendant does not abate an action.¹ But at common law, the marriage of a female complainant abates the suit, and it must be revived either in favor of or against her husband.² An answer upon a promissory note that the maker is a married woman is sufficient as a confession and avoidance.³ In an action brought to charge the separate estate of a married woman, when the coverture is alleged in the complaint, a defense that the defendant is a married woman

² *Rose v. Otis*, 18 Colo. 59, 51 Pac. 493; *Snell v. Snell*, 123 Ill. 403, 5 Am. St. Rep. 526, 14 N. E. 684; *Cook v. Walling*, 117 Ind. 9, 10 Am. St. Rep. 17, 2 L. R. A. 769, 19 N. E. 532; *Hansce v. Fiero*, 56 Hun (N. Y.) 463, 25 Abb. N. C. 46, 10 N. Y. Supp. 494; *Brice v. Miller*, 35 S. C. 537.

³ *Atwood v. Higgins*, 76 Me. 423.

⁴ *Calderwood v. Pyser*, 31 Cal. 333.

⁵ *Warner v. Steamship Uncle Sam, The*, 9 Cal. 697.

¹ *Campbell v. Browne*, 5 Pal. Ch. (N. Y.) 34.

² *Quackenbush v. Leonard*, 10 Pal. Ch. (N. Y.) 131.

³ *Scudder v. Gori*, 26 N. Y. Super. Ct. Rep. (3 Rob.) 661, 18 Abb. Pr. 223.

is bad on demurrer, for it sets up no new matter;⁴ and such an answer is insufficient.⁵ A married woman may answer separately, where homestead or her separate estate is involved.⁶

§ 1138. — — — — — ARBITRATION AND AWARD. The plea of coverture, and that the defendant's husband did not consent to the arbitration upon the award in which a judgment was founded, is not sufficient in proceeding by scire facias to revive the judgment. Though this plea might be a good defense to an action on the judgment, yet, until such judgment is set aside, the defendant can not resist the scire facias, the object of which is to enforce process upon such judgment.¹

§ 1139. — — MISJOINDER OF PARTIES. In those cases in which a misjoinder of parties, either plaintiff or defendant, appears upon the face of the complaint, objection because of the infirmity must be taken by demurrer,¹ or any objection because thereof is deemed waived;² where the misjoinder does not appear upon the face of the complaint, the objection must be taken by answer, or any objection because of the infirmity is deemed waived.³ Misjoinder of parties plaintiff, owing to matters which have occurred pending the action, must be taken by supple-

⁴ Aiken v. Clark, 16 Abb. Pr. (N. Y.) 328.

⁵ Id.

⁶ Moss v. Warner, 10 Cal. 296; Harley v. Ritter, 9 Abb. Pr. (N. Y.) 400, 13 How. Pr. 147; Phillips v. Burr, 11 N. Y. Super. Ct. Rep. (4 Duer) 113.

In California, the matter is fully regulated by the procedural code. See Kerr's Cyc. Cal. Code Civ. Proc., 2d ed., § 370; Consolidated Supp. 1906-1913, p. 1408, and § 371.

¹ Taylor v. Harris, 21 Tex. 438.

² See, ante, §§ 935-943.

³ Code Pl. and Pr.—95

² See, ante, §§ 877, 878.

³ Dunn v. Tozer, 10 Cal. 167; Wendt v. Ross, 33 Cal. 650; Hastings v. Stark, 36 Cal. 122; Trenor v. Central Pac. R. Co., 50 Cal. 222; Smith v. Don, 96 Cal. 73, 30 Pac. 1024; Asevado v. Orr, 100 Cal. 293, 34 Pac. 777; Williams v. Southern Pac. R. Co., 110 Cal. 257, 261, 42 Pac. 974; Russ v. Tuttle, 158 Cal. 226, 231, 110 Pac. 813; Minter v. Durham, 13 Ore. 470, 11 Pac. 231.

As to nonjoinder of parties plaintiff in partition, see Sutter v. San Francisco, City and County of, 36 Cal. 112.

mental answer, or it is waived.⁴ Objection should be taken by demurrer or answer to the misjoinder of parties defendant. An answer will not be treated as a plea in abatement for a misjoinder of parties defendant, after the testimony has disclosed a proper cause of action against them.⁵ The objection that there is a misjoinder of defendants must be raised by demurrer or answer; and if not so raised, the plaintiff will be entitled to recovery against all the defendants.⁶

§ 1140. — MISNOMER—MUST BE PLEADED. Misnomer of plaintiff or defendant must be pleaded in abatement;¹ a default judgment against the defendant under such

⁴ *Calderwood v. Pyser*, 31 Cal. 333; *Barstow v. Newman*, 34 Cal. 90.

As to joinder of plaintiffs, in general, see, ante, § 591; *Kerr's Cyc. Cal. Code Civ. Proc.*, §§ 373-384; also, *Frost v. Hanford*, 40 Cal. 165; *Andrews v. Pratt*, 44 Cal. 319; *Powell v. Powell*, 48 Cal. 234.

As to nonjoinder, see *McGilveray v. Morehead*, 3 Cal. 271; *Estell v. Chenery*, 3 Cal. 467; *Whitney v. Stark*, 8 Cal. 516, 68 Am. Dec. 360; *Conner v. Hutchinson*, 12 Cal. 126; *Coleman v. Clements*, 23 Cal. 245; *Barber v. Cazalis*, 30 Cal. 96; *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Smith v. Lawrence*, 38 Cal. 24, 99 Am. Dec. 344; *Moss v. Wilson*, 40 Cal. 159; *Gates v. Lane*, 44 Cal. 396.

⁵ *Warner v. Wilson*, 4 Cal. 310; *Dunn v. Tozer*, 10 Cal. 167, 170.

⁶ *Fosgate v. Herklmer Mfg. & Hydraulic Co.*, 12 N. Y. 580, affirming 12 Barb. 352; *Minor v. Mechanics' Bank*, 26 U. S. (1 Pet.) 46, 7 L. Ed. 47; *Gilman v. Rives*, 35 U. S. (10 Pet.) 298, 9 L. Ed. 432; *Story v. Livingston*, 38 U. S. (13 Pet.) 359, 10 L. Ed. 200;

Chandler v. Byrd, 1 Hempst. 222, Fed. Cas. No. 2591b.

¹ CAL.—*Welsh v. Kirkpatrick*, 30 Cal. 202, 204, 89 Am. Dec. 85; *King v. Randlett*, 33 Cal. 318, 321. ILL.—*Pennsylvania Co. v. Sloan*, 125 Ill. 72, 8 Am. St. Rep. 337, 17 N. E. 37. IND.—*Hess v. Lowrey*, 122 Ind. 225, 17 Am. St. Rep. 355, 7 L. R. A. 90, 23 N. E. 156. ME.—*Baker v. Bessex*, 73 Me. 472. MISS.—*Alabama & V. R. Co. v. Bolding*, 69 Miss. 255, 263, 30 Am. St. Rep. 541, 544, 13 So. 844. N. Y.—*Mann v. Carley*, 4 Cow. 148; *Collman v. Collins*, 2 N. Y. Super. Ct. Rep. (2 Hall) 569; *Miller v. Stettiner*, 20 N. Y. Super. Ct. Rep. (7 Bosw.) 692, 22 How. Pr. 518.

As to naming parties in complaint, see, ante, § 808.

As to suing defendant in fictitious name, see, ante, § 658.

As to misnomer of defendant, see note 52 Am. St. Rep. 607.

"One summoned by a wrong name, being thus informed that he is sued, although not correctly described by his true name, not availing himself of the opportunity to appear and object, whereby

name is not void.² And this is so even in case of a corporation.³ In suits or proceedings by or against any corporation, a mistake in the name is waived if not pleaded in abatement. Misnomer of the plaintiff can not be taken advantage of on the trial or by plea in bar, but must be pleaded in abatement.⁴ Where two or more persons associated in any business transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name.⁵ It is a familiar rule that a person may

his true name would be inserted in the proceedings, should be precluded from afterwards objecting. Having remained silent when he might and should have spoken, he must ever afterwards be silent as to the matter."—Campbell, C. J., in *Alabama & V. R. Co. v. Bolding*, 69 Miss. 255, 263, 30 Am. St. Rep. 541, 544, 13 So. 844.

To the same effect are, among other cases: CAL.—*Welsh v. Kirkpatrick*, 30 Cal. 202, 89 Am. Dec. 85. ILL.—*Guinard v. Heysinger*, 15 Ill. 288. KAN.—*Hoffield v. Board of Education*, 33 Kan. 644, 7 Pac. 216. MD.—*First Nat. Bank v. Jagers*, 31 Md. 38, 100 Am. Dec. 53. MASS.—*Smith v. Bowker*, 1 Mass. 76; *Medway Cotton Mfg. Co. v. Adams*, 10 Mass. 360. MO.—*Parry v. Woodson*, 33 Mo. 347, 84 Am. Dec. 51. N. Y.—*Waterbury v. Mather*, 16 Wend. 611. S. C.—*Waldrop v. Leonard*, 22 S. C. 118. FED.—*Lafayette Ins. Co. v. French*, 59 U. S. (18 How.) 404, 15 L. Ed. 451, affirming 5 McL. 461, Fed. Cas. No. 5102.

² *Welsh v. Kirkpatrick*, 30 Cal. 202, 205-6, 89 Am. Dec. 85; *Casper v. Klippen*, 61 Minn. 353, 355, 52 Am. St. Rep. 604, 606, 63 N. W. 737.

In all future litigation the true name of the defendant may be stated, and he may be connected with the judgment by proper averments.—See, among other cases: CAL.—*Sutter v. Cox*, 6 Cal. 415; *Welsh v. Kirkpatrick*, 30 Cal. 203, 89 Am. Dec. 85. ILL.—*Guinard v. Heysinger*, 15 Ill. 288. IND.—*Bloomfield R. Co. v. Burress*, 82 Ind. 83. MD.—*First Nat. Bank v. Jagers*, 31 Md. 38, 100 Am. Dec. 53. MASS.—*Fitzgerald v. Salentine*, 51 Mass. (10 Metc.) 436. MINN.—*Casper v. Klippen*, 61 Minn. 353, 52 Am. St. Rep. 604, 63 N. W. 737. MO.—*Parry v. Woodson*, 33 Mo. 347, 84 Am. Dec. 51. S. C.—*Waldrop v. Leonard*, 22 S. C. 118. FED.—*Lafayette Ins. Co. v. French*, 59 U. S. (18 How.) 404, 15 L. Ed. 451, affirming 5 McL. 461, Fed. Cas. No. 5102.

³ *Alabama & V. R. Co. v. Bolding*, 69 Miss. 255, 30 Am. St. Rep. 541, 13 So. 844; *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526; *Methodist Episcopal Church v. Tryon*, 1 Den. (N. Y.) 451.

⁴ *Hanly v. Blanton*, 1 Mo. 49; *Boisse v. Langham*, 1 Mo. 572; *Thompson v. Elliott*, 5 Mo. 118.

⁵ See *Kerr's Cyc. Cal. Code Civ.*

be sued by a fictitious name, but a personal judgment against a fictitious person or against a person not the party to the suit would, of course, be worthless, assuming that such judgment could be obtained. This relates to defendant. A plaintiff ought to know his own name.⁶

§ 1141. — NONJOINDER OF NECESSARY PARTIES—IN GENERAL. The nonjoinder of necessary parties, like the misjoinder of parties,¹ where it appears upon the face of the complaint, objection is to be taken by demurrer,² otherwise it must be by answer.³ Such a failure to join may be objected to by a plea in abatement.⁴ If an objection is not thus interposed, the defendant must be held to have waived the objection.⁵ And an answer upon the merits waives all such defects.⁶

§ 1142. — — OBJECTION: HOW AND WHEN MUST BE TAKEN. In an action on a joint contract, the omission to sue all the joint contractors may be specially pleaded.¹ The same in an action against an attorney, one of a partnership composed of several attorneys.² The plea must

Proc., 2d ed., § 388; Consolidated Supp. 1906-1913, p. 1420.

As to effect of such judgment, see, *id.*; also, *Mulliken v. Hull*, 5 Cal. 246.

⁶ See *Kerr's Cyc. Cal. Code Civ. Proc.*, § 474; also, *ante*, § 658.

¹ See, *ante*, § 1139.

² See, *ante*, §§ 935-943.

³ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 433.

Failure to join a dormant partner as defendant in an action against the partnership, can not be pleaded in abatement.—*Pin-schower v. Hanks*, 18 Nev. 99, 1 Pac. 454.

⁴ *Whitney v. Stark*, 8 Cal. 514, 68 Am. Dec. 360; *Newhall-House Stock Co. v. Flint & P. M. R. Co.*, 47 Wis. 516, 2 N. W. 1123.

⁵ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 434; see, also, *Trenor v. Central Pac. R. Co.*, 50 Cal. 223; *Conklin v. Barton*, 43 Barb. (N. Y.) 435.

⁶ *Gillam v. Sigman*, 29 Cal. 637; *Merritt v. Walsh*, 32 N. Y. 685; *Wendt v. Ross*, 33 Cal. 650; *Hastings v. Stark*, 36 Cal. 126; *Rutenberg v. Main*, 47 Cal. 221; *Tennant v. Pfister*, 51 Cal. 513; *Heinlen v. Heilborn*, 71 Cal. 557, 561, 12 Pac. 673; *Gruhn v. Stanley*, 92 Cal. 86, 88, 28 Pac. 56; *Farncomb v. Stern*, 18 Colo. 279, 283, 32 Pac. 612; *Bibb v. Allen*, 149 U. S. 481, 504, 37 L. Ed. 819, 13 Sup. Ct. Rep. 950.

¹ *Sweet v. Tuttle*, 14 N. Y. 465, affirming 10 How. Pr. 40.

² *Wooster v. Chamberlain*, 23 Barb. (N. Y.) 602.

give the names truly, so that the plaintiff may proceed correctly the second time. If it appear on the trial that another note named by the plea was also a joint contractor, the proof fails.³ This rule is not changed by the Code.⁴ The fact that other persons, jointly responsible, have not been made defendants, must be pleaded in abatement, or it can not be taken advantage of on the trial. The rule applies to all joint contracts, as well as to those arising particularly from mercantile partnerships.⁵ In a bill to set aside a conveyance, as made without consideration, and in fraud of creditors, the alleged fraudulent grantor is a necessary defendant in the bill.⁶ The answer should allege that they are still living;⁷ or, if a corporation, that it is still in existence.⁸ But the omission to allege this is cured by proof on the trial that they were still living. Objection to such proof after it has been introduced should be disregarded, or the answer amended to conform to the proof.⁹ It sufficiently alleges that they are still living, if it alleges that they reside at a place named.¹⁰ After showing the facts which make it appear that other parties are necessary, and naming the parties, it is unnecessary to add a formal allegation that they are necessary parties.¹¹

§ 1143. ——— TENANTS IN COMMON. In California all persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or pro-

³ Merchants' & Farmers' Bank v. Dakin, 24 Wend. (N. Y.) 411; Hawkes v. Munger, 2 Hill (N. Y.) 200.

⁴ Fowler v. Kennedy, 2 Abb. Pr. (N. Y.) 347.

⁵ Ziele v. Campbell, 2 Johns. Cas. (N. Y.) 382; Williams v. Allen, 7 Cow. (N. Y.) 316; Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Le Page v. McCrea, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469.

⁶ Gaylord v. Kelshaw, 68 U. S. (1 Wall.) 81, 17 L. Ed. 612.

⁷ Burgess v. Abbott, 6 Hill (N. Y.) 135, affirming 1 Hill 476.

⁸ Id.

⁹ Wooster v. Chamberlin, 28 Barb. 602.

¹⁰ Taylor v. Richards, 22 N. Y. Super. Ct. Rep. (9 Bosw.) 679.

¹¹ Cook v. Mancus, 3 Johns. Ch. (N. Y.) 427.

ceeding for the enforcement or protection of the rights of such party.¹

§ 1144. — PAYMENT — HOW AND WHEN MUST BE PLEADED. In all of the states except California, payment or part payment¹ may be set up in the answer as new matter, and must be specially pleaded.² In California, payment may be proved by the defendant under a general denial, upon the ground that such denial makes it incumbent on the plaintiff to prove a subsisting indebtedness from the defendant to the plaintiff at the time of the commencement of the suit.³ In Illinois, payment may

¹ See Kerr's Cyc. Cal. Code Civ. Proc., § 384.

² Solary v. Stultz, 22 Fla. 263; McKyring v. Bull, 16 N. Y. 297, 69 Am. Dec. 696.

³ KAN.—Stevens v. Thompson, 5 Kan. 305; St. Louis, Ft. S. & W. R. Co. v. Grove, 39 Kan. 731, 18 Pac. 958. MO.—Hyde v. Hazel, 43 Mo. App. 668. N. Y.—Henderson v. Henderson, 3 Den. 314; Field v. New York, City of, 6 N. Y. 179, 189, 57 Am. Dec. 435; Morrell v. Irving Fire Ins. Co., 33 N. Y. 189, 88 Am. Dec. 396; Martin v. Gage, 9 N. Y. 398, 1 Seld. Notes 178; Lent v. New York & M. R. Co., 130 N. Y. 504, 28 Abb. N. C. 478, 29 N. E. 988; Pattison v. Taylor, 1 N. Y. Code Rep. (N. S.) 174, 8 Barb. 250; Fellers v. Lee, 2 Barb. 488, 489; Fort v. Gooding, 9 Barb. 371; Morey v. Farmers' Loan & Trust Co., 18 Barb. 406; decision reversed on another point 14 N. Y. 302; New York Life Ins. & Trust Co. v. Covert, 20 Barb. 435; judgment reversed on another point 3 Abb. Ct. App. Dec. 350, 6 Abb. Pr. N. S. 154, 3 Trans. App. 24; Texler v. Gonin, 12 N. Y. Super. Ct. Rep. (5 Duer) 389.

³ Frisch v. Coler, 21 Cal. 71, 74; Brown v. Orr, 29 Cal. 120; Davanay v. Eggenhoff, 43 Cal. 395; Wetmore v. San Francisco, City of, 44 Cal. 294, 300.

Plea of payment is not new matter, because, although an affirmative allegation, its effect is only a denial of an essential allegation in the complaint, to wit, nonpayment; and it is deemed denied.—Frisch v. Coler, 21 Cal. 71, 74-5; Goddard v. Fulton, 21 Cal. 430, 436; Woodworth v. Knowlton, 22 Cal. 168; Fairchild v. Amsbaugh, 22 Cal. 575; Mulford v. Estudillo, 23 Cal. 100; Brown v. Orr, 29 Cal. 120; Davanay v. Eggenhoff, 43 Cal. 395; Scott v. Wood, 81 Cal. 398, 404, 22 Pac. 871; Mendocino County v. Johnson, 125 Cal. 337, 340, 58 Pac. 5.

—General denial raises the issue of payment, where the complaint contains an allegation of nonpayment as a necessary and material fact to constitute the cause of action, and proof of payment may be made under such general denial without a special plea of payment.—Id.; Brown v. Forbes, 6 Dak. 273, 43 N. W. 93; Knapp v. Roche,

be shown under the plea of the general issue;⁴ and in New York, if a complaint contains an allegation of non-payment as a necessary and material fact to constitute the cause of action, proof of payment is admissible under a general denial in the answer.⁵ The same rule prevailed in Dakota territory⁶ and has been carried into the two Dakota states, which follow the New York practice, and is the rule in Montana;⁷ but it does not prevail in Colorado.⁸ In Indiana⁹ and Oregon,¹⁰ a plea of payment is new matter, which, not being denied by the reply, stands admitted. In Pennsylvania, payment with leave is a general issue plea, and with notice of special matter, admits anything which proves fraud, mistake, want or failure of consideration, and shows that *ex æquo et bono* a part or whole of the amount claimed should not be recovered.¹¹ A plea of payment admits all the allegations in the complaint essential to support the action,¹² and throws the affirmative of the issue on the defendant.¹³ In Colorado, a plea of payment being an affirmative defense, must be supported by a preponderance of the evidence in order to be effective in favor of the party pleading it.¹⁴ The court holds that in *assumpsit* payment may be proved

94 N. Y. 329; *Hun v. Van Dyck*, 26 Hun (N. Y.) 567, affirmed 92 N. Y. 660.

As to proof of payment under a general denial, see note 61 Am. Dec. 61.

—Otherwise in Colorado, we shall see presently.—See footnote 8, this section.

⁴ *Teuber v. Schumacher*, 44 Ill. 577.

⁵ *Knapp v. Roche*, 94 N. Y. 329; *Hun v. Van Dyck*, 26 Hun (N. Y.) 567; affirmed, 92 N. Y. 660.

⁶ *Brown v. Forbes*, 6 Dak. 273, 43 N. W. 93.

⁷ *Mauldin v. Ball*, 5 Mont. 96, 99, 1 Pac. 409.

⁸ *Ebensen v. Hoover*, 3 Colo. App. 467, 33 Pac. 1008.

⁹ *Adams v. Tuley*, 1 Ind. App. 490, 27 N. E. 991.

¹⁰ *Benicia Agricultural Works v. Creighton*, 21 Ore. 495, 28 Pac. 775, 30 Pac. 676; *Clark v. Wick*, 25 Ore. 446, 36 Pac. 165.

¹¹ *Uhler v. Sanderson*, 38 Pa. St. 128.

¹² *Archer v. Morehouse*, 1 Hempst. 184, Fed. Cas. No. 18225.

¹³ *Gebhart v. Francis*, 32 Pa. St. 78; *North Pennsylvania R. Co. v. Adams*, 54 Pa. St. 94, 93 Am. Dec. 677.

¹⁴ *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 285, 28 Pac. 391.

under an answer denying that the defendant has not paid the plaintiff in full, or that there is now due from the defendant to the plaintiff any sum whatever, although the payment is not affirmatively averred.¹⁵

In pleading payment, it is not necessary that the answer should describe the particulars of the transaction relied on as constituting payment. Under the averment that the demand has been paid, it is competent to prove how it has been paid, whether in cash or otherwise.¹⁶ But where payment made to wife of plaintiff was pleaded, without alleging her authority to receive it, it was held bad on demurrer;¹⁷ so where payment was made by check,¹⁸ or by negotiable note,¹⁹ that in such case it must be averred that such note was taken in payment.²⁰ So also a surety for rent may set up payment made by tenant for repairs, agreed to be done by the landlord, by way of reduction for the claim of rent.²¹ And under the plea of payment, a surety may show that the plaintiff has taken a draft of the principal debtor, payable at a future day, in payment of the debt.²² It would be bad pleading to allege evidence of the payment instead of averring the fact itself.²³ Payment of a debt by a stranger can not be pleaded in bar of the defendant's own obligation.²⁴ Part performance of an obligation, either before or after a breach thereof, where expressly accepted by the creditor

¹⁵ *Mickle v. Heinlen*, 92 Cal. 596, 18 Pac. 784.

¹⁶ *Boyd v. Weeks*, 2 Den. (N. Y.) 321, 43 Am. Dec. 749, affirming 5 Hill 393; *Farmers' & Citizens' Bank v. Sherman*, 33 N. Y. 69; *McLaughlin v. Webster*, 141 N. Y. 76, 35 N. E. 1081.

¹⁷ *Offley v. Clay*, 2 Man. & G. 172, 2 Scott N. R. 372.

¹⁸ See: *Bradford v. Fox*, 39 Barb. (N. Y.) 203, 16 Abb. Pr. 51, judgment reversed on another point in 38 N. Y. 289, 7 Transc. App. 254;

Strong v. Stevens, 11 N. Y. Super. Ct. Rep. (4 Duer) 668.

¹⁹ *Hoogland v. Wright*, 20 N. Y. Super. Ct. Rep. (7 Bosw.) 394.

²⁰ See *Homas v. McConnell*, 3 McL. 381, Fed. Cas. No. 6656.

²¹ *Rosenbaum v. Gunter*, 3 E. D. Smith (N. Y.) 203.

²² *Albany Ins. Co. v. Devendorf*, 43 Barb. (N. Y.) 444.

²³ *Farmers' & Citizens' Bank v. Sherman*, 33 N. Y. 69.

²⁴ *Blum v. Hartman*, 3 Daly (N. Y.) 47.

in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation.²⁵

Where payment has been made to the sheriff, under an execution against the plaintiff, in accordance with statute, the particulars should be stated.²⁶ An answer setting up payment after suit brought is good, although it demand that the complaint be dismissed, and judgment granted for costs. Under the Code, no formal conclusion is required, and no judgment or relief is required to be prayed for, except where the defendant asks affirmative relief against the plaintiff.²⁷ An answer alleging payment is the proper form in which to set up the defense of a presumption of payment arising from lapse of time, under New York statute.²⁸ A receipt in full, given by the plaintiff after suit is brought, is a good defense by way of plea.²⁹ That the time of payment has been extended must be specially pleaded.³⁰ It is not essential to designate the time of payment, though it ought to appear to have been before suit.³¹ Alleging that the defendant paid the plaintiff the several, etc., pursuing the terms of the complaint, imports payment of interest as well as the principal, and it is, therefore, unnecessary to aver its receipt in full satisfaction.³² By the pleas of payment and payment with leave, the defendant does not put in issue his original

²⁵ Kerr's Cyc. Cal. Civil Code, § 1524.

²⁶ Calkins v. Packer, 21 Barb. (N. Y.) 275, 282.

²⁷ Bendit v. Annesley, 42 Barb. (N. Y.) 192, 27 How. Pr. 184.

²⁸ Henderson v. Henderson, 3 Den. (N. Y.) 314; Pattison v. Taylor, 8 Barb. (N. Y.) 250, 1 N. Y. Code Rep. (N. S.) 174; New York Life Ins. Co. v. Covert, 29 Barb. (N. Y.) 435, judgment reversed on another point in 3 Abb. Ct. App. Dec. 350.

²⁹ See: Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369; Wade v. Emerson, 17 Mo. 267; Wade v. Goldsberry, 17 Mo. 270.

³⁰ See: Goddard v. Fulton, 21 Cal. 430; Allen v. Bruesing, 32 Ill. 505; Newell v. Salmons, 22 Barb. (N. Y.) 647.

³¹ Bird v. Caritat, 2 Johns. (N. Y.) 342.

³² Chew v. Woolley, 7 Johns. (N. Y.) 399.

legal liability. Under such pleadings he can only show that he has paid the debt, or that he has an equitable defense to the action.³³ Under a simple allegation of payment, evidence of any facts which amount to actual payment by the person alleged to have made it, is admissible.³⁴

Manner of pleading payment, where the payment is claimed to have been in money, by a general allegation of payment is sufficient, without setting out the amount of the payment, the date of the payment, or to whom the payment was made.³⁵ But where an answer alleges payment in goods and services, it must also be alleged that the plaintiff agreed to accept them as payment.³⁶ A plea of payment concluding to the country, with a similitude, while irregular, raises an issue, substantially, upon the question whether the whole debt or obligation has been paid, and is sufficient.³⁷ Where there is a plea of the general issue and a plea of payment, the two pleas are conflicting, and the latter plea prevails.³⁸ A plea of payment upon information and belief is sufficient to raise an issue of fact.³⁹ An allegation of payment without a further showing that the payment was upon the claim sued upon, is insufficient;⁴⁰ so also is a plea alleging that defendant "advanced" to the plaintiff a specified sum of money.⁴¹ An allegation that payment was made by a check or bill of exchange for the amount sued for, "which has not been returned but is still outstanding," is insuffi-

³³ *Loose v. Loose*, 36 Pa. St. 538.

³⁴ *Farmers' & Citizens' Bank v. Sherman*, 33 N. Y. 69.

³⁵ IND.—*Louden v. Britt*, 4 Ind. 566; *Brown v. Sooden*, 16 Ind. 444; *Demuth v. Daggy*, 26 Ind. 341; *Cranor v. Winters*, 75 Ind. 301; *State v. Early*, 81 Ind. 540; *Johnson v. Breedlove*, 104 Ind. 521, 6 N. E. 906. LA.—*Holmes v. Deplaigne*, 23 La. Ann. 238. N. H.—

Breck v. Blanchard, 20 N. H. 323, 51 Am. Dec. 222.

³⁶ *Corbett v. Hughes*, 75 Iowa 281, 39 N. W. 500.

³⁷ *Hamilton v. Coons*, 35 Ky. (5 Dana) 317.

³⁸ *Jones v. Bishop*, 12 La. 397.

³⁹ *First Nat. Bank v. Roberts*, 2 N. D. 195, 49 N. W. 722.

⁴⁰ *Esch v. Hardy*, 22 Minn. 65.

⁴¹ *Dickson v. Dickson*, 32 La. Ann. 272.

cient, unless the answer shows affirmatively that the check or bill of exchange is out of possession or control of the plaintiff.⁴²

§ 1145. ——— BY NOTE OR CHECK—ACCEPTANCE OF NEGOTIABLE PAPER. It has been held that under an answer averring payment by note, evidence of payment in money or by check is inadmissible.¹ This rule is only to be applied to avoid surprise or prejudice to the plaintiff.² The acceptance of a negotiable promise of payment from a debtor suspends the remedy upon the original indebtedness, but acceptance of a non-negotiable promise does not, unless it is founded upon a new consideration.³ An answer which states that defendant gave his check for the sum lent, and interest to the time it was given, and that the plaintiffs have not returned it, and that it is still outstanding, is insufficient, unless it also avers that plaintiffs have negotiated it to a third person, who holds or owns it.⁴

§ 1146. ——— RELEASE—HOW PLEADED, AND EFFECT OF. A release by one of several joint plaintiffs is a bar to the action.¹ A sealed release to one of several joint obligors

⁴² Strong v. Stevens, 11 N. Y. Super. Ct. Rep. (4 Duer) 668.

As to payment by check or note, see, post, § 1145.

¹ Canfield v. Miller, 79 Mass. (13 Gray) 274.

² Farmers' & Citizens' Bank v. Sherman, 19 N. Y. Super. Ct. Rep. (6 Bosw.) 181; affirmed, 33 N. Y. 69.

³ See: Combination Steel & Iron Co. v. St. Paul City R. Co., 47 Minn. 207, 49 N. W. 744; Geller v. Seixas, 4 Abb. Pr. (N. Y.) 103; Ranken v. Deforest, 18 Barb. (N. Y.) 143, 144.

⁴ Strong v. Stevens, 11 N. Y. Super. Ct. Rep. (4 Duer) 668.

Compare: Geller v. Seixas, 4 Abb. Pr. (N. Y.) 103; Thayer v.

King, 15 Ohio 242; Crowe v. Clay, 25 Eng. L. & Eq. 451.

¹ Hawn v. Seventy-Six Land & Water Co., 74 Cal. 418, 16 Pac. 196; Austin v. Hall, 13 Johns. (N. Y.) 286, 7 Am. Dec. 376; Mott v. Burnett, 2 E. D. Smith (N. Y.) 50.

Release not delivered does not constitute a release in law; and where defendant's evidence discloses the fact that the release set up was never delivered, the defendant will be estopped to claim the benefit of the admission arising out of plaintiff's failure to deny by affidavit the genuineness and due execution of the instrument set up by the defendant.—Clark v. Child, 66 Cal. 87, 4 Pac. 1058.

inures to the benefit of all.² Otherwise of a covenant not to sue.³ In California, a release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their rights of contribution from him.⁴ An equitable discharge from judgment does not support a plea of payment, but should be specially pleaded as a release, and a defendant, being surety, having thus incorrectly pleaded, was allowed to amend, on the condition that he should recover no costs of action.⁵ A release of one of several joint or joint and several debtors or obligors, is a release to all;⁶ and extinguishes the obligation.⁷ And so, in the case of joint wrongdoers.⁸ If any matter of

² Rowley v. Stoddard, 7 Johns. (N. Y.) 207.

³ Chicago, City of, v. Babcock, 148 Ill. 358, 32 N. E. 271; Tuckerman v. Newhall, 17 Mass. 583; Harrison v. Close, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444.

⁴ Kerr's Cyc. Cal. Civil Code, § 1543.

As to release generally, see, *Id.*, §§ 1541, 1542.

⁵ Shelton v. Hurd, 7 R. I. 403, 84 Am. Dec. 564.

⁶ Armstrong v. Hayward, 6 Cal. 183, 185; Griffith v. Grogan, 12 Cal. 324; Prince v. Lynch, 38 Cal. 531, 99 Am. Dec. 427; Tuckerman v. Newhall, 17 Mass. 583; American Bank v. Doolittle, 31 Mass. (14 Pick.) 126; Goodenow v. Smith, 35 Mass. (18 Pick.) 415, 29 Am. Dec. 600; Rowley v. Stoddard, 7 Johns. (N. Y.) 207.

As to release of one joint or joint and several obligor, see note 138 Am. St. Rep. 834-840.

⁷ McCrea v. Purmort, 16 Wend. (N. Y.) 474.

⁸ See, among other cases: ALA.—McCoy v. Louisville & N. R. Co.,

146 Ala. 336, 40 So. 106. COLO.—Ducey v. Patterson, 37 Colo. 221, 119 Am. St. Rep. 284, 11 Ann. Cas. 393, 9 L. R. A. (N. S.) 1068, 86 Pac. 109. IND.—Cleveland, C. C. & St. L. R. Co. v. Hilligoss, 171 Ind. 424, 131 Am. St. Rep. 258, 86 N. E. 485. IOWA.—Miller v. Beck, 108 Iowa 578, 79 N. W. 344; Snyder v. Mutual Telephone Co., 135 Iowa 229, 14 L. R. A. (N. S.) 329, 112 N. W. 776. KAN.—Missouri, K. & T. R. Co. v. McWherter, 59 Kan. 351, 53 Pac. 135. MINN.—Haitigan v. Dickson, 81 Minn. 286, 83 N. W. 1091. MO.—Hubbard v. St. Louis & M. R. Co., 173 Mo. 255, 72 S. W. 1073. N. C.—Sircey v. Hans Rees' Sons, 144 N. C. 303, 71 S. E. 310. PA.—Seither v. Philadelphia Traction Co., 125 Pa. St. 397, 11 Am. St. Rep. 905, 4 L. R. A. 54, 17 Atl. 338. VT.—Robinson v. St. Johnsbury & L. C. R. Co., 80 Vt. 149, 12 Ann. Cas. 1060, 9 L. R. A. (N. S.) 1254, 66 Atl. 814. WASH.—Abb v. Northern Pac. R. Co., 28 Wash. 431, 92 Am. St. Rep. 864, 58 L. R. A. 298, 68 Pac. 954. WIS.—Ellis v. Esson, 50 Wis. 138,

defense has arisen after an issue in fact, it may be pleaded by the defendants; as that the plaintiff has given him a release, or, in an action by an administrator, that the plaintiff's letters of administration have been revoked.⁹ A release by the plaintiff must be specially pleaded.¹⁰ A release given after issues joined in an action can properly only be the subject of a supplemental answer, and not of an amendment to that originally put in.¹¹ The law implies the release and discharge of a right of action, where the creditor voluntarily delivers to his debtor the bond, note, or other evidence of his claim.¹² The destruction or cancellation of a written contract, or of the signature of the parties liable thereon, with intent to extinguish the obligation thereof, extinguishes it as to all the parties consenting to the act.¹³ The intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act.¹⁴ Where a contract is executed in duplicate, an alteration or destruction of one copy, while the other exists, is not within the provisions of the last statement.¹⁵ Release of property from levy on execution discharges third parties who are liable collaterally, or as

36 Am. Rep. 830, 6 N. W. 518; *Pogel v. Meilke*, 60 Wis. 248, 18 N. W. 927. FED.—*O'Shea v. New York, C. & St. L. R. Co.*, 44 C. C. A. 604, 105 Fed. 562.

See note 138 Am. St. Rep. 906, 4 L. R. A. 54, and to all the other annotated case series above cited.

⁹ *Yeaton v. Lynn, Use of Lyles*, 30 U. S. (5 Pet.) 224, 8 L. Ed. 105, affirming 3 Cr. C. C. 182, Fed. Cas. No. 8642.

¹⁰ 1 Van Santv. Eq. Pl. 403. See: *Turner v. Caruthers*, 17 Cal. 431; *Coles v. Soulsby*, 21 Cal. 50.

¹¹ *Matthews v. Chicopee Manuf. Co.*, 26 N. Y. Super. Ct. Rep. (3 Robt.) 711.

¹² Poth. Obl., n. 608, 609; *Bouv. Law Dict.*, tit. Release; *Beach v. Endress*, 51 Barb. (N. Y.) 570, 579; *Albert's Ex'rs v. Ziegler's Ex'rs*, 29 Pa. St. 50.

¹³ *Kerr's Cyc. Cal. Civil Code*, § 1696.

¹⁴ *Id.*, § 1700.

¹⁵ *Id.*, § 1701.

As to release by novation, see *Id.*, §§ 1530-1533.

sureties therefor.¹⁶ To avoid circuitry of action, a covenant may be pleaded as a release, but it must be a covenant between the parties to the original obligation, and must contain words that will give the covenantee a right of action, which will precisely countervail that to which he is liable.¹⁷

§ 1147. — STATUTE OF FRAUDS — ESSENTIAL AVERTMENTS. We have already seen, in the discussion of "matters that must be pleaded,"¹¹ that fraud, where relied upon as a defense, must be specially pleaded,² but that the better doctrine and the weight of authority is to the effect that the statute of frauds does not require to be specially pleaded,³ for the reasons there stated, which need not be repeated here; but there is a line of cases holding that a plea of the statute of frauds should expressly aver that the contract concerning lands, sought to be enforced, was not in writing.⁴ In an action on a contract not in writing, but which to be binding on defendant should be in writing, under general denial the existence of the contract is in issue.⁵ Or defendant may deny that the contract is in writing or that it is subscribed.⁶ The rule under the former practice, that when the terms of a contract are in dispute, and the answer does not deny the contract, the terms of it can not be proved by parol, is altered by the New York Code, and now an answer is sufficient which admits the making of

¹⁶ *Mulford v. Estudillo*, 23 Cal. 94.

¹⁷ *Garnett v. Macon*, 2 Brock. 185, 6 Call 308, Fed. Cas. No. 5245.

¹ See, ante, § 1086.

² See, ante, § 1086, footnote 21.

³ See, ante, § 1086, footnotes 24-30.

⁴ *Bean v. Valle*, 2 Mo. 126.

See, also, cases and discussion in text, ante, § 1086, footnotes 24-30.

⁵ *Champlin v. Parish*, 11 Pal. Ch. (N. Y.) 408; *Amburger v. Marvin*, 4 E. D. Smith (N. Y.) 393; *Haight v. Child*, 34 Barb. (N. Y.) 186, 191; *Livingston v. Smith*, 14 How. Pr. (N. Y.) 490, 492.

⁶ *Id.*; *Cozine v. Graham*, 2 Pal. Ch. (N. Y.) 181; *Ontario Bank v. Root*, 3 Pal. Ch. (N. Y.) 478; *Harris v. Knickerbocker*, 5 Wend. (N. Y.) 638.

a contract and sets out its terms, although it omits to set up the statute of frauds as a bar.⁷ The title being no part of an act, it need not be recited.⁸ That neither the defendant, nor any person by him lawfully authorized, did ever make or sign any contract or agreement in writing, for making or executing any lease to the said plaintiff, of the same premises, or any of them, or of any part thereof, or to any such effect as is alleged; or any memorandum or note in writing of any agreement whatsoever, for or concerning the demising or leasing, or making or executing any lease of the said premises, or any of them, or any part thereof, to the plaintiff, is a sufficient allegation.⁹ A plaintiff's recovery can not be barred by the statute of frauds, unless the statute be pleaded.¹⁰ Where contract is void ab initio, a general plea of non est factum is proper. Where it is merely voidable, a special plea setting forth the special circumstances is necessary.¹¹

⁷ Haight v. Child, 34 Barb. (N. Y.) 186.

⁸ Eckert v. Head, 1 Mo. 593.

⁹ Equity Draftsman, 654.

¹⁰ CAL.—Osborne v. Endicott, 6 Cal. 149, 65 Am. Dec. 498; Border v. Conklin, 77 Cal. 330, 19 Pac. 513. COLO.—Benjamin v. Mattler, 3 Colo. App. 227, 32 Pac. 837; Hamill v. Hall, 4 Colo. App. 290, 35 Pac. 927. ILL.—Hogan v. Easterday, 58 Ill. App. 45. NEV.—Maynard v. Johnson, 2 Nev. 16. N. Y.—Cruse v. Findlay, 16 Misc. 576, 38 N. Y. Supp. 741.

See discussion and authorities, ante, § 1086.

California doctrine now is different.—See: Feeney v. Howard, 79 Cal. 525, 12 Am. St. Rep. 162, 4 L. R. A. 826, 21 Pac. 984; Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; McCann v. Pennie, 100 Cal. 547, 35 Pac. 158.

New York doctrine as now expressed is given in footnote 13, this section, and text going therewith.

¹¹ Somnes v. Skinner, 16 Mass. 348; Anthony v. Wilson, 31 Mass. (14 Pick.) 303; Marine Ins. Co. v. Hodgson, 10 U. S. (6 Cr.) 206, 3 L. Ed. 200; Greathouse v. Dunlap, 3 McL. 303, Fed. Cas. No. 5742; Bottomley v. United States, 1 Story 135, Fed. Cas. No. 1688.

As to what contracts are required to be in writing, see Kerr's Cyc. Cal. Civil Code, §§ 1624, 1739, 1741, 2794.

Cases held to be within the statutes, see, among other cases: Fuller v. Reed, 38 Cal. 99; Patten v. Hicks, 43 Cal. 509; Swift v. Swift, 46 Cal. 266; Pratalongo v. Larco, 47 Cal. 378; Gray v. Corey, 48 Cal. 208; Hagar v. Spect, 48 Cal. 406; Gallagher v. Mars, 50 Cal. 23; Stewart v. Jerome, 71 Mich.

When the defendant is charged as an original debtor under the common counts in assumpsit, without intimation as to a guaranty, it is not necessary for him to plead specially that the contract was one of guaranty, and was void under the statute of frauds, because not in writing, but he may in such case avail himself of the statute under the general denial.¹²

New York rule now is that where a complaint on contract does not show the contract sued on to be invalid under the statute of frauds, the statute is waived by the defendant unless specially pleaded as a defense, and can not be taken advantage of under a general denial.¹³

Averments in pleadings in avoidance of the statute of frauds must not only be direct and positive, but they must be clear and unequivocal, or they will not be regarded as sufficient, either in form or substance.¹⁴ But where a sale of personal property of the value specified in the statute, or more, is pleaded in an action at law, it is not necessary to plead facts in avoidance of the statute of frauds.¹⁵

§ 1148. — — — CORPORATIONS — ACTS ULTRA VIRES. Assuming that the corporation under some circumstances was authorized to take and transfer real estate by deed, it rests with the defendant to show by allegation and proof that the plaintiff did not take or transfer the title

201, 15 Am. St. Rep. 252, 38 N. W. 895.

Cases held not to be within the statute, see, among other cases: Heyn v. Phillips, 37 Cal. 529; Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340; Hoffman v. Frett, 39 Cal. 109; Price v. Sturgess, 44 Cal. 591; Murphy v. Rooney, 45 Cal. 78; Brennan v. Ford, 46 Cal. 7; McCarger v. Rood, 47 Cal. 138; Welch v. Kenney, 49 Cal. 49.

¹² Harris v. Frank, 81 Cal. 280, 22 Pac. 856.

¹³ Porter v. Wormser, 94 N. Y. 431; Wells v. Monihan, 129 N. Y. 161, 29 N. E. 232, affirming 13 N. Y. Supp. 156; Crane v. Powell, 139 N. Y. 379, 30 Abb. N. C. 419, 34 N. E. 911, affirming 19 N. Y. Supp. 220.

¹⁴ Von Trotha v. Bamberger, 15 Colo. 1, 24 Pac. 883.

¹⁵ Shelton v. Conant, 10 Wash. 193, 38 Pac. 1013.

to the premises in question for any purpose, and in the form authorized by law.¹ The term *ultra vires*, when used in reference to corporations, is employed in different senses. An act is said to be *ultra vires* when it is not in the power of the corporation to perform it under any circumstances; and an act is also said to be *ultra vires*, with reference to the rights of certain parties, when the corporation can not perform it without their consent; and it may also be *ultra vires*, with reference to some specific purpose, when the corporation can not perform it for that purpose.² When the act is *ultra vires* in the sense first mentioned, it is void in toto, and the corporation may avail itself of the plea; but when it is *ultra vires* in the second and third senses, the right of the corporation to avail itself of the plea will depend on the circumstances of the case.³ It devolves upon the party contesting the validity of such act to overcome the presumption that it was regularly done, and for a rightful purpose.⁴ Corporations for the construction of turnpike roads can hold only such real estate as the purposes of the corporation may require.⁵

In an action against a corporation the plea of *ultra vires* is not to be entertained when its allowance will do great wrong to innocent third persons.⁶ And courts are inclined to treat the corporation as estopped from setting up such defense in all cases where it has received and retains the benefit of the transaction, and seeks by this plea to avoid its correlative obligation.⁷ Where a con-

¹ *Farmers' Loan & Trust Co. v. Curtis*, 7 N. Y. 466, 1 Seld. Notes 7.

² *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Griffith v. New York Life Ins. Co.*, 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113.

³ *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

⁴ *Id.*

¹ Code Pl. and Pr.—96

⁵ *Coleman v. San Rafael Turnpike Road Co.*, 49 Cal. 517; see, also, *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83.

⁶ *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771.

⁷ *Kennedy v. California Sav. Bank*, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039; *Pauly v. Pauly*,

tract with a corporation is not only ultra vires but also void as against public policy, the court will not give relief to either party, and the fact that the contract is performed on one part does not estop the other party to plead the invalidity of the contract.³

§ 1149. — STATUTE OF LIMITATIONS — CALIFORNIA STATUTE: "ACTION." We have already briefly referred to the pleading of the statute of limitations, in connection with matters which the defendant must plead,¹ and stated the general principles relating to this plea in the chapter on the general principles and rules of pleading.² It remains here to give a more detailed consideration to the subject. The term "action," as used in the California procedural code,³ in reference to the limitation of actions, includes a special proceeding of a civil nature.⁴ Actions for relief in respect to which no other limitation is provided, must be brought within four years after the cause of action shall have accrued.⁵ To actions brought to recover money or other property deposited with any bank, banker, trust company, or savings and loan society, there is no limitation.⁶

§ 1150. — — APPLICATION OF STATUTE. In California, the statute of limitations applies equally to actions at law and to suits in equity. It is directed to the subject-matter, and not to the form of the action, nor to the forum in which the action is prosecuted. Nor is there

107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

³ Visalla Gas & Electric Light Co. v. Sims, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042.

¹ See, ante, § 1086, footnote 31.

² See, ante, § 726.

³ Kerr's Cyc. Cal. Code Civ. Proc., § 458.

⁴ Id., 363.

Limitations of actions for recovery of real property, see Kerr's Cyc. Cal. Code Civ. Proc., §§ 315-328.

Limitation of actions other than for the recovery of real property, see Id., §§ 335-363.

⁵ Kerr's Cyc. Cal. Code Civ. Proc., § 343.

⁶ Id., 2d ed., § 348, Biennial Supp. 1915, p. 3053.

any distinction in the limitation prescribed between simple contracts in writing and specialties.¹

In Colorado, distinct forms of action have been abolished by the procedural code, yet, in order to determine the application of the statute of limitations in a given case, the court will consider the nature of the cause of action, and, in some instances, its appropriate form under former practice.²

§ 1151. ——— CONSTRUCTION OF ANSWER. An answer stating that the cause of action has not accrued within five years is sufficient for five years, and for any period of limitation named in the statute less than five years.¹ The words "preceding the commencement of this action," in such answer, are equivalent to the words "preceding the filing of this complaint."² The defense must point to the time of filing the original complaint, and not an amended one.³

§ 1152. ——— CONSTRUCTION OF STATUTE. Statutes of limitation do not act retrospectively; they do not begin to run until they are passed, and consequently can not be pleaded until the period fixed by them has fully run since their passage.¹ The statute runs not from the time of the promise, but from the time of the breach.² The mere

¹ *Lord v. Morris*, 18 Cal. 482; *Boyd v. Blankman*, 29 Cal. 20; *Hancock v. Plummer*, 66 Cal. 337, 5 Pac. 514; *Castro v. Gill*, 110 Cal. 292, 52 Am. St. Rep. 84, 42 Pac. 804.

² *Toothaker v. Boulder, City of*, 13 Colo. 219.

¹ *Boyd v. Blankman*, 29 Cal. 19; *Adams v. Patterson*, 35 Cal. 122; *Osborn v. Hopkins*, 160 Cal. 501, 504, Ann. Cas. 1913A, 413, 117 Pac. 519.

² *Adams v. Patterson*, 35 Cal. 122.

³ *Lorenzana v. Camarillo*, 45 Cal. 125, 128; *Link v. Jarvis* (Cal.), 33 Pac. 207; *Frost v. Witter*, 132 Cal. 421, 427, 84 Am. St. Rep. 53, 59, 64 Pac. 705.

As to relation of new pleading to the statute of limitations, see note 3 L. R. A. (N. S.) 277.

¹ *Nelson v. Nelson*, 6 Cal. 430; *Lehmaier v. King*, 10 Cal. 374; *Vrooman v. Li Po Tai*, 113 Cal. 302, 305, 45 Pac. 470; *Gillette v. Hibbard*, 3 Mont. 412, 415.

² *Stilwell v. Hasbrouck*, 1 Hill (N. Y.) 561; *United States v. White*, 2 Hill (N. Y.) 59, 37 Am.

statement in the complaint that the claim was due at a certain time does not conclude the plaintiff under the statute of limitations, if it appears from the facts stated that the right of action did not accrue till a later date.³ It is not necessary that the defense of the statute of limitations should be accompanied by a denial of the allegations of the complaint intended to avoid or head off the defense, to prevent the court taking them as true.⁴ The statute of limitations does not have the effect to extinguish a debt, nor raise a presumption of its payment; it only bars the remedy and thus becomes a statute of repose.⁵ The defendant is not bound to negative the exceptions from the general rule that the statute establishes. It lies upon the plaintiff to aver and prove the facts that create the exception;⁶ and if so averred, a pure plea of the statute is no bar, unless accompanied with an answer destroying the force of those circumstances by issuable averments.⁷ But it has been held also that such allegations are immaterial, and need not be answered.⁸

Plaintiff deemed to have pleaded in reply to an answer setting up the bar of the statute of limitations, such matters as he relies upon to take the case out of the limitation of the statute.⁹

Dec. 374; *Tracy v. Rathbun*, 3 Barb. (N. Y.) 543.

³ *Haldea v. Crofts*, 4 E. D. Smith (N. Y.) 490, 2 Abb. Pr. 301.

⁴ *Sands v. St. John*, 36 Barb. 628, 23 How. Pr. 140, affirmed 4 Abb. Ct. App. Dec. 153.

⁵ *McCormick v. Brown*, 36 Cal. 180; *Cooper v. Cooper*, 61 Miss. 676.

Rule as to sufficient acknowledgment to take it out of the statute, affirmed in *Farrell v. Palmer*, 36 Cal. 187.

⁶ *Huntington v. Brinckerhoff*, 10 Wend. (N. Y.) 278; *Ford v. Bab-*

cock, 4 N. Y. Super. Ct. Rep. (2 Sandf.) 518, 7 N. Y. Leg. Obs. 270.

⁷ *Goodrich v. Pendleton*, 3 Johns. Ch. (N. Y.) 384; *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417.

See Story's Eq. Pl., § 754.

⁸ *Sands v. St. John*, 36 Barb. (N. Y.) 628, 23 How. Pr. 140; affirmed, 4 Abb. Ct. App. Dec. 153.

In California controlled by provisions of Kerr's Cyc. Cal. Code Civ. Proc., § 458.

⁹ *Fox v. Taylor*, 89 Cal. 239, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897; *Giles v. Rosenheimer*, 64 Tex. 243.

§ 1153. — — — ESSENTIAL ALLEGATIONS. The statute of limitations must be specially pleaded, unless the bar clearly appears upon the face of the complaint;¹ otherwise it is deemed waived.² If the demand be in truth barred, but the fact does not appear on the face of the complaint, the defense must be made in the answer.³ In New York, it seems it can only be taken by answer, and not by demurrer,⁴ and is not favored unless in aid of

¹ CAL.—Curtiss v. *Ætna Life Ins. Co.*, 90 Cal. 245, 250, 25 Am. St. Rep. 114, 27 Pac. 211. COLO.—Hunt v. Hayt, 10 Colo. 278, 15 Pac. 410. MISS.—Wilkinson v. Flowers, 37 Miss. 579, 75 Am. Dec. 78. MO.—Orr. v. Rode, 101 Mo. 387, 13 S. W. 1066. N. Y.—Waggoner v. Jermaine, 3 Den. 306, 45 Am. Dec. 474; Bihin v. Bihin, 17 Abb. Pr. 19; Sands v. St. John, 36 Barb. 628, 23 How. Pr. 140; affirmed, 4 Abb. Ct. App. Dec. 153; Fogal v. Pirro, 23 N. Y. Super. Ct. Rep. (10 Hosw.) 100, 17 Abb. Pr. 113, 119. N. C.—Guthrie v. Bacon, 107 N. C. 337, 12 S. E. 204; Albertson v. Terry, 109 N. C. 8, 13 S. E. 713. ORE.—Steamer *Senorita*, The, v. Simonds, 1 Ore. 274. TENN.—Johnson v. Cooper, 10 Tenn. (2 Yerg.) 524, 24 Am. Dec. 502. VA.—Hickman v. Stout, 2 Leigh 6; Smith v. Hutchinson, 78 Va. 683; Gibson v. Green's Admr., 89 Va. 524, 37 Am. St. Rep. 888, 16 S. E. 661. W. VA.—Seborn v. Beckwith, 30 W. Va. 774, 5 S. E. 450. WIS.—Parker v. Kane, 4 Wis. 1, 65 Am. Dec. 283. FED.—Lyon v. Bartram, 61 U. S. (20 How.) 149, 15 L. Ed. 847, affirming 1 McAll. 53, Fed. Cas. No. 1362.

As to enjoining defendant from pleading the statute of limitations, see note 75 Am. Dec. 84.

Formal plea not necessary of the statute of limitations in those cases where the nature of the proceeding is such that the statute can not be interposed directly as a bar to the plaintiff's right of action, and is relied upon merely as precluding the plaintiff from assailing, on the ground of fraud, an instrument the defendant relies upon to defeat the cause of action.—Jackson v. Plyler, 38 S. C. 496, 37 Am. St. Rep. 782, 17 S. E. 255.

² Osment v. McElrath, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731; Curtiss v. *Ætna Life Ins. Co.*, 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211; Pleasant v. Samuels, 114 Cal. 34, 38, 39, 45 Pac. 998; Lloyd v. Davis, 123 Cal. 348, 350, 55 Pac. 1003; Jennings v. Rickard, 10 Colo. 395, 15 Pac. 677; Atchison, T. & S. F. R. Co. v. Tanner, 19 Colo. 559, 36 Pac. 541; Smith v. Hutchinson, 78 Va. 683.

See notes, 50 Am. Dec. 391.

³ Smith v. Richmond, 19 Cal. 476.

⁴ Butler v. Mason, 5 Abb. Pr. (N. Y.) 40, 16 How. Pr. 546; Sands v. St. John, 36 Barb. (N. Y.) 628, 23 How. Pr. 140; affirmed, 4 Abb. Ct. App. Dec. 153; Lefferts v. Hollister, 10 How. Pr. (N. Y.) 383, 16 How. Pr. 546; Budd v. Walker, 29 Hun (N. Y.) 344, 3 N. Y. Civ.

justice.⁵ A defendant who claims the benefit of an act for the limitation of actions, which applies only to a particular class of cases, must plead it specially.⁶ Pleading the statute of limitations is a personal privilege which the defendant may assert or waive at his option, but must be set up in some form, either by demurrer or answer, and if not so set up is deemed waived.⁷ The statute of limitations may be allowed to be pleaded at any time when in furtherance of justice.⁸ So, in case of the allowance of a several plea after a joint plea filed.⁹ Or the court may refuse permission to set up the statute after pleading to the merits.¹⁰ If the statute of limitations is pleaded, and the plea is overruled, it can not be put in again by the same parties or their privies.¹¹ A defendant relying on the statute of limitations should not allege matter of law, but the facts which bring him within the statute.¹² But the California code has provided that in pleading the statute of limitations it is not necessary to state the facts

Proc. Rep. 422; *Irvin v. Smith*, 60 Wis. 175, 18 N. W. 724.

⁵ *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348.

⁶ *Howell v. Rogers*, 47 Cal. 293.

As to absolute right to interpose defense of statute of limitations, where it exists, see *Sheldon v. Adams*, 4 Barb. (N. Y.) 54, 18 Abb. Pr. 405, 27 How. Pr. 179; *Harriott v. Wells*, 22 N. Y. Super. Ct. Rep. (9 Bosw.) 631.

As to injunction against pleading defense of statute of limitations, see note 75 Am. Dec. 84.

⁷ CAL.—*Grattan v. Wiggins*, 23 Cal. 16; *Kelley v. Kriess*, 68 Cal. 210, 9 Pac. 129; *Cameron v. San Francisco, City of*, 68 Cal. 390, 9 Pac. 430; *Wise v. Williams*, 72 Cal. 544, 14 Pac. 204; *Reagan v. Justices' Court*, 75 Cal. 233, 17

Pac. 195; *Kramer v. Halsey*, 82 Cal. 209, 22 Pac. 1137. COLO.—*Cross v. Moffatt*, 11 Colo. 210, 17 Pac. 771. ORE.—*Davis v. Davis*, 20 Ore. 78, 25 Pac. 140.

⁸ *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348.

⁹ *Robinson v. Smith*, 14 Cal. 254.

¹⁰ *Stuart v. Landers*, 16 Cal. 372, 76 Am. Dec. 538.

¹¹ *Fisher v. Rutherford*, 1 Baldw. 188, Fed. Cas. No. 4823.

As to how pleaded, see *Bank of Columbia v. Ott*, 2 Cr. C. C. 575, Fed. Cas. No. 879; *Union Bank v. Ellason*, 2 Cr. C. C. 657, Fed. Cas. No. 14350; *Soulden v. Von Rensselaer*, 3 Wend. (N. Y.) 472; *Fisher v. Pond*, 2 Hill (N. Y.) 338; *Bell v. Yates*, 33 Barb. (N. Y.) 627.

¹² *Boyd v. Blankman*, 29 Cal. 20, 87 Am. Dec. 146.

showing the defense; it may be stated generally, that the cause of action is barred by the provisions of section ... (giving the number of the section and the subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegations be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred.¹³ To rely upon the presumption of payment from lapse of time, the defendant should plead, not the statute, but payment, and if he can not swear to this, his affidavit may state the facts which raise the presumption of payment.¹⁴ A court of equity will refuse to entertain a suit brought after an unreasonable delay, regardless of the question whether there has been a plea of the statute of limitations.¹⁵ The statute should not be pleaded as a bar to the whole demand, if it is a good defense to a part only.¹⁶ The statute of limitations is pleadable to any one or all of several distinct causes of action, though embraced in a single count.¹⁷ But when the statute is pleaded only as to two counts, and not as to the third count, the question as to the bar of the statute can not be raised upon motion for a nonsuit upon the ground that the claim of the plaintiff is barred. The word "claim," as thus used in the grounds of the motion, includes the whole claim set forth in the three counts, and the action in its entirety could not be held to have been barred.¹⁸ An allegation of lapse of time was held not to amount to a plea of the

¹³ Kerr's Cyc. Cal. Code Civ. Proc., § 458. See, also: Packard v. Johnson, 57 Cal. 180; Packard v. Moss, 68 Cal. 123, 8 Pac. 818; Manning v. Dallas, 73 Cal. 420, 15 Pac. 34.

Reference to explanatory sections is unnecessary.—Webber v. Clarke, 74 Cal. 11, 15 Pac. 431; Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 34 Pac. 444.

¹⁴ Giles v. Baremore, 5 Johns. Ch. (N. Y.) 545.

¹⁵ Harris v. Hillegass, 66 Cal. 79, 4 Pac. 987; Chapman v. Bank of California, 97 Cal. 155, 31 Pac. 896.

¹⁶ Wood v. Riker's Ex'rs, 1 Pal. Ch. (N. Y.) 616.

¹⁷ Gilpin v. Adams, 14 Colo. 512, 24 Pac. 566.

¹⁸ Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 137.

statute of limitations, in a case where leave to plead the statute had been refused.¹⁹ A general allegation in an answer, that the action is barred by the statute prescribing two or any other number of years as the limitation for bringing the action, is not the correct method of pleading the statute of limitations.²⁰ Such allegation is an insufficient plea and raises no issues under the statute requiring the section of the code relied upon to be stated.²¹ Where the statute of limitations imposes a bar upon certain species of contracts after three years, and upon others after two years, and the plea did not show that the contract in question was of the latter class, the plea was bad.²² An action on a new promise to pay a judgment, so as to avoid the bar of the statute, must be brought within four years from the making of the new promise.²³ In California since 1863, the statute runs against a married woman in all those actions to which her husband is not a necessary party plaintiff with her.²⁴

§ 1154. — — — STATUTES OF DIFFERENT STATES: RULE. Where the cause of action accrued in one state, and suit was brought upon it in another state, a plea of the statute of limitations of the former state was not a good plea; but the same was demurrable, and the court sustained the demurrer.¹ The rule is that the statute of limitations of the country in which the suit is brought may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the rule of *lex loci contractus* can

¹⁹ *People ex rel. Barton v. Rensselaer Ins. Co.*, 38 Barb. (N. Y.) 323.

²⁰ *Schroeder v. Jahns*, 27 Cal. 278. See *McKay v. Petaluma Lodge No. 77*, F. A. M., 1 Cal. Unrep. 278.

²¹ *Id.*; *Howell v. Rogers*, 47 Cal. 291; *Cochrane v. Bussche*, 7 Utah 235, 26 Pac. 294.

²² *Lyon v. Bertram*, 61 U. S.

(20 How.) 150, 15 L. Ed. 847, affirming 1 McAll. 53, Fed. Cas. No. 1362.

²³ *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170

²⁴ *Wilson v. Wilson*, 36 Cal. 447, 95 Am. Dec. 194.

See *Kerr's Cyc. Cal. Code Civ. Proc.*, § 328, subd. 4.

¹ *Townsend v. Jamison*, 51 U. S. (9 How.) 407, 13 L. Ed. 194.

not prevail.² When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon can not there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued.³ It is a universally accepted rule that statutes of limitations are to be strictly construed. General words in the statute must receive general construction, and if there be no express exception the court can make none.⁴

§ 1155. ——— SUSPENSION OF REMEDY. If the mortgagee, after obtaining a judgment foreclosing his mortgage, by an agreement with the mortgagor enters into possession of the mortgaged property, and receives the rents and profits, and applies them towards the satisfaction of the amount due, and the mortgagee further agrees not to issue an order of sale, the statute of limitations does not run against either party, so long as the debt remains unpaid, and they acquiesce in the arrangement.¹ And this rule applies to a mortgagee in possession, even though the debt is barred by the statute of limitations, and the mortgagor can not maintain action to recover possession until the debt is paid;² but it would be other-

² Id.

³ Kerr's Cyc. Cal. Code Civ. Proc., § 361. See, also, *Allen v. Allen*, 95 Cal. 184, 16 L. R. A. 646, 30 Pac. 213.

See 33 C. C. A. 336, 97 Fed. 525.

⁴ *Tyman v. Walker*, 35 Cal. 643.

Strict construction should be given to the statute of limitations. —See: *Martin v. Tally*, 72 Ala. 24; *Heflin v. Burns*, 70 Tex. 347, 8 S. W. 48.

¹ *Frink v. Le Roy*, 49 Cal. 314, 322; *Warder v. Enslan*, 73 Cal. 291, 294, 14 Pac. 874; *Spect v.*

Spect, 88 Cal. 437, 443-4, 22 Am. St. Rep. 314, 318, 319, 13 L. R. A. 137, 26 Pac. 203.

² CAL.—*Frink v. Le Roy*, 49 Cal. 314, 322; *Spect v. Spect*, 88 Cal. 437, 443-4, 22 Am. St. Rep. 314, 318-9, 13 L. R. A. 137, 26 Pac. 203; *Hooper v. Young*, 140 Cal. 274, 280, 98 Am. St. Rep. 56, 71 Pac. 140. KAN.—*Kelso v. Norton*, 65 Kan. 778, 790, 93 Am. St. Rep. 308, 70 Pac. 896. MONT.—*Fee v. Swingly*, 6 Mont. 596, 600, 13 Pac. 375. NEB.—*Felino v. Newcomb Lumber Co.*, 64 Neb. 338, 97 Am.

wise where the possession is not obtained by the mortgagor's consent.³

§ 1156. ——— WHEN ACTION COMMENCED. Filing the complaint is the commencement of the action.¹ The position that the filing of the complaint without the issuance of the summons does not prevent the statute running is not tenable.² But it seems the plaintiff should issue his summons within a year.³

§ 1157. ——— WHEN CAUSE OF ACTION ACCRUES. The clause, "after the cause of action shall have accrued," does not imply in addition the existence of a person legally competent to enforce it by suit. It runs in all cases not expressly excepted from its operation.¹ Where the statute of limitations is pleaded by the defendant, a finding as to matter which takes the case out of the statute is within the issues.² The statute does not run between partners until the accounts are settled and a balance agreed upon.³ In an action for money had and received, where the complaint avers receipt of the money within two years, and the answer denies all the material

St. Rep. 646, 89 N. W. 756. N. J.—*Den v. Wright*, 7 N. J. L. (2 Halst.) 175, 11 Am. Dec. 546. N. Y.—*Phyfe v. Riley*, 15 Wend. 248, 30 Am. Dec. 55; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519; *Madison Ave. Church v. Oliver St. Church*, 73 N. Y. 82; *Shaler v. Singer*, 44 Barb. 614. ORE.—*Roberts v. Sutherland*, 4 Ore. 220; *Cooke v. Cooper*, 18 Ore. 142, 29 Pac. 945. PA.—*Wells v. Van Dyke*, 100 Pa. St. 335. TEX.—*Duke v. Reed*, 64 Tex. 705. WASH.—*Brundage v. Home Savings & Loan Assoc.*, 11 Wash. 277, 287, 39 Pac. 666. WIS.—*Tallman v. Ely*, 6 Wis. 244; *Brinkman v. Jones*, 44 Wis. 512.

¹ *Boggs v. Douglass*, 105 Iowa 344, 347, 75 N. W. 185.

² *Kerr's Cyc. Cal. Code Civ. Proc.*, § 350.

³ *Sharp v. Maguire*, 19 Cal. 577; *Pimental v. San Francisco, City of*, 21 Cal. 367.

⁴ See *Kerr's Cyc. Cal. Code Civ. Proc.*, § 406; also, *Allen v. Marshall*, 34 Cal. 166.

⁵ *Tynan v. Walker*, 35 Cal. 643; *O'Neil v. Magner*, 81 Cal. 631, 15 Am. St. Rep. 88, 22 Pac. 876; *Wabash County Commrs. v. Pearson*, 120 Ind. 425, 16 Am. St. Rep. 325, 22 N. E. 134; *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767.

⁶ *Hendy v. March*, 75 Cal. 566, 17 Pac. 702.

⁷ *Id.*

allegations of the complaint, and alleges that the cause of action is barred by the statute of limitations, the plaintiff may prove and the jury may take into consideration any evidence of concealment of facts, misrepresentations, deceit, or other facts constituting fraud on the part of the defendant which would take the case out of the statute, though the complaint contains no averment as to those matters.⁴ A plea of the statute of limitations in an unverified answer to a complaint of foreclosure of a mortgage is properly stricken out as sham, where it appears from the copies of the notes and mortgage set out in the complaint that the action was commenced within four years after the maturity of the note.⁵ The statute of limitations to be available as a bar to the prosecution of a writ of error in the Supreme Court must be specially interposed at a preliminary stage of the proceeding, and before issue joined upon the merits, and if the protection of the statute be not thus invoked by the party entitled to it, it will be deemed waived.⁶ The courts will in some cases allow the statute of limitations to be set up by amendment.⁷ And where the nature of the answer interposed to a complaint and the proof thereunder clearly indicate that it was the intention of the defendant to plead a three years' statute of limitations as a bar, and by a mistake the defendant in pleading such statute had specified two years instead of three, it is not an abuse of discretion for the court, after the hearing of the cause, to allow an amendment correcting the mistake, although the equities of the case may be in favor of the plaintiff.⁸

⁴ *Williams v. Dennison*, 94 Cal. 540, 29 Pac. 946.

⁵ *Bank of Shasta v. Boyd*, 99 Cal. 604, 34 Pac. 337.

⁶ *Haley v. Elliott*, 20 Colo. 199, 37 Pac. 27.

⁷ See *Gormeley v. Bunyan*, 138 U. S. 623, 34 L. Ed. 1086, 11 Sup. Ct. Rep. 453.

⁸ *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054.

§ 1158. — **TENDER—PLEA OF: WHEN AND HOW MADE.** The plea of payment,¹ tender and readiness to pay, are affirmative pleas which cast the burden of proof upon the defendant.² The plea of tender must be specifically stated,³ and must show that the tender set up was made at or before the commencement of the action.⁴ A statement that the tender set up was made "on or about" a designated date is sufficient.⁵ An answer setting up a tender must show that the defendant has always been and still is ready to pay said tender,⁶ and the money must be brought into court.⁷ And it is essential in set-

¹ As to plea of payment, see, ante, §§ 1144, 1145.

² Halpin v. Phenix Ins. Co., 118 N. Y. 165, 23 N. E. 482; North Pennsylvania R. Co. v. Adams, 54 Pa. St. 94, 93 Am. Dec. 677.

³ Duff v. Fisher, 15 Cal. 376; Bryan v. Maume, 28 Cal. 238; Hegler v. Eddy, 53 Cal. 597.

⁴ Murray v. Windley, 29 N. C. (7 Ired. L.) 201, 47 Am. Dec. 324; Winningham v. Redding, 51 N. C. (6 Jones L.) 126; Cope v. Bryson, 60 N. C. (Winst. L.) 112.

Creditor keeping out of way to avoid or prevent a tender of the amount due to him, and then commencing suit, such suit will be stayed upon the payment of the amount due, although technical right of action existed at the time of the commencement of the action.—Noyes v. Clark, 7 Pal. Ch. (N. Y.) 179, 32 Am. Dec. 620.

"Defendant has been and still is ready and willing to perform each and all the covenants and conditions of his agreement on his part to be performed, and to pay plaintiffs the full sum to be paid upon the performance on their part of the covenants and conditions by them to be kept and performed"

does not constitute a plea of tender.—Heine v. Treadwell, 72 Cal. 217, 13 Pac. 503.

⁵ Halle v. Smith, 113 Cal. 656, 45 Pac. 872.

Sufficient plea of tender, in an action against an irrigating water company to allege that at a specified time there was tendered to the water company in cash a specified sum of money for the payment for such water as might be furnished at the rates established,—as against a general demurrer.—Lowe v. Yolo County Water Co., 8 Cal. App. 167, 96 Pac. 379.

⁶ Lanier v. Triggs, 14 Miss. (6 Smed. & M.) 641, 45 Am. Dec. 293. Murray v. Windley, 29 N. C. (7 Ired. L.) 201, 47 Am. Dec. 324; North Pennsylvania R. Co. v. Adams, 54 Pa. St. 94, 93 Am. Dec. 677.

⁷ Bryan v. Maume, 28 Cal. 238; Henderson v. Cass County, 107 Mo. 50, 18 S. W. 992; Levan v. Sternfeld, 55 N. J. L. 41.

An allegation that the defendant tendered to the plaintiff a specified sum of money "in full of all amounts due under the contract 'sued on' at the time of the commencement of the suit, and which

ting up a tender to allege that the money is brought into court.⁸ The plea of a tender should not contain explanatory or extenuating circumstances or matters not affecting the defense thus pleaded, and where such matters are included they will be properly stricken out as surplusage.⁹ Where the defendant pleads tender before suit, and pays the amount of his tender into court, and the plaintiff fails to show himself entitled to a larger sum, it is proper to render judgment for the defendant for his costs, and in favor of the plaintiff for the amount due at the time of the tender.¹⁰ In such case the plaintiff shall not recover costs, but shall pay the costs of suit to the defendant.¹¹ A tender does not extinguish or satisfy the obligation, and an offer to comply with the demand of judgment does not amount to a satisfaction thereof.¹² Actual production and offer of money to creditor is necessary to a valid tender;¹³ and it must be unconditional; if receipt or satisfaction-piece be asked for, it vitiates it.¹⁴ So, an offer in writing to pay a particular sum of

amount the plaintiff refused to have, and at all times refused to accept," sufficiently shows a tender, as against an objection raised for the first time after judgment, on the ground that it was not alleged that the money was brought into court, and that the defendant continued ready to pay the same. —Diebold Safe & Lock Co. v. Holt, 4 Okla. 479, 46 Pac. 512.

⁸ Hill v. Place, 30 N. Y. Super. Ct. Rep. (7 Rob.) 389, 5 Abb. Pr. N. S. 18, 36 How. Pr. 26; affirmed, 30 N. Y. Super. Ct. Rep. (7 Rob.) 392, note.

As to defense of tender generally, see Brickett v. Wallace, 98 Mass. 528; Grover v. Smith, 165 Mass. 132, 52 Am. St. Rep. 506, 42 N. E. 555; Livingston v. Harrison, 2 E. D. Smith 197; Wilder v.

Seelye, 8 Barb. (N. Y.) 408; People v. Banker, 8 How. Pr. (N. Y.) 258.

⁹ Basler v. Sacramento Gas & Electric Co., 158 Cal. 514, Ann. Cas. 1912A, 642, 111 Pac. 530.

¹⁰ Curliac v. Abadie, 25 Cal. 502; Logue v. Gillick, 1 E. D. Smith (N. Y.) 398.

¹¹ Kerr's Cyc. Cal. Code Civ. Proc., § 1030.

¹² Redington v. Chase, 34 Cal. 666.

As to legal effect of plea of tender, see Supply Ditch Co. v. Elliott, 10 Colo. 327; 3 Am. St. Rep. 586, 15 Pac. 691; Phoenix Ins. Co. v. Readinger, 28 Neb. 587, 44 N. W. 864.

¹³ Strong v. Blake, 46 Barb. (N. Y.) 227.

¹⁴ Roosevelt v. Bull's Head Bank, 45 Barb. (N. Y.) 579.

money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.¹⁵ In an action by a landlord against a tenant to recover possession of property for failure to pay rent, a plea of tender by the defendant is insufficient under Washington code of 1881,¹⁶ unless it alleges that the defendant offered to pay interest on the rent due, or that he brings into court the amount of rent in arrear, with interest and costs of action.¹⁷ Insufficient tender of purchase price of land by lessee under a lease giving him the privilege of purchasing the demised premises at any time during the term is set up by simply declaring readiness and willingness to purchase; an absolute notice and tender of the money must be set out.¹⁸ A plea of tender never goes to the whole of the plaintiff's demand, but is an admission to the extent of the amount tendered, and is a denial only of the balance of the plaintiff's claim.¹⁹ The plea, if defective, should be demurred to.²⁰

§ 1159. ——— JOINDER OF ISSUE ON PLEA OF. In those cases in which the plaintiff joins issue on such a plea, without questioning its sufficiency, he can not afterwards object that it was not duly filed, or that the money was not paid into court at the first term.¹ If, by the laws of the United States, more than one kind of lawful money is a legal tender in payment of debts, and the plaintiff in an action is entitled to a judgment payable in a particular kind of money, a plea of tender which avers the

In California it is otherwise, the procedural code providing that a receipt properly signed may be demanded as a condition of the payment or delivery.—Kerr's Cyc. Code Civ. Proc., § 2075.

¹⁵ Kerr's Cyc. Cal. Code Civ. Proc., § 2074.

¹⁶ Wash. Code, § 548.

¹⁷ *Ralph v. Lomar*, 3 Wash. 401, 28 Pac. 760.

¹⁸ *Heine v. Treadwell*, 72 Cal. 217, 13 Pac. 503.

¹⁹ *Gardner v. Black*, 98 Ala. 633, 12 So. 813.

²⁰ *Id.*; *Hanson v. Todd*, 95 Ala. 328, 10 So. 354.

¹ *Rudolph v. Wagner*, 36 Ala. 698.

tender to have been made in lawful money of the United States is insufficient. The plea should aver that the tender was made in the kind of money the plaintiff is entitled to receive.² The Legal Tender Act is held constitutional.³ It is competent for the state legislature to enact that all tolls, dockage and wharfage charges payable into the public treasury shall be due and collectible exclusively in gold and silver money of the United States.⁴

§ 1160. — WANT OF CAPACITY TO SUE—ALIEN ENEMY.

It is not the purpose at this time and place to discuss the intricate questions of the "alien enemy" doctrine, but to be content with the unsupported statement that an alien enemy can not maintain a suit in our courts during the pendency of hostilities between this country and the sovereignty to which such alien enemy owes allegiance. A plea setting up the facts of such alienage, the country to which allegiance is owed, and the fact that a state of war exists between that country and the United States, will have the effect of preventing the plaintiff from proceeding with the suit,¹ even though he be resident within the United States, although such residence presumptively defeats the plea.² The disability, however, will continue during the state of hostilities, only.³ Where an alien commences action in time of peace, it is competent, on a declaration of war with the country of his domicile, to interpose this plea.⁴

§ 1161. — — CORPORATIONS — CONSOLIDATION. In those cases in which, by state statute, power is given to

² *Magraw v. McGlynn*, 26 Cal. 428.

³ *Belloc v. Davis*, 38 Cal. 242, 254, and the cases there cited.

⁴ *People ex rel. Board of State Harbor Commrs. v. Steamer America*, 34 Cal. 676.

¹ See form sustained in *Bell v. Chapman*, 10 Johns. (N. Y.) 182.

² *Clark v. Morey*, 10 Johns. (N. Y.) 69.

³ *Hammersley v. Lambert*, 2 Johns. Ch. (N. Y.) 508.

⁴ *Society for the Propagation of the Gospel v. Wheeler*, 2 Gall. 105, Fed. Cas. No. 13156.

connecting railway corporations to merge and consolidate their stock, and such merger and consolidation has been judicially decided by the Supreme Court of the state to be a dissolution in law of the previous companies, and the creation of a new corporation with new liabilities; in such case, where the declaration avers that the defendant had agreed that stocks of one of the connecting railroads should be worth a certain price at a certain time and in a certain place, and the plea sets up that under the statute the stock of the railway named was merged and consolidated by the consent of the party suing, with a second railway named, so forming "one joint-stock company of the said two corporations," under a corporate name stated, such plea is good, though it do not aver that the consolidation was done without the consent of the defendants.¹ Such a plea contains two points only which the plaintiff can traverse, the fact of consolidation, and the fact of consent; and these must be denied separately. If denied together, the replication is double and bad.²

§ 1162. — — — — — DENIAL OF INCORPORATION. The want of capacity to sue or be sued must be specially alleged.¹ By pleading to the merits the objection is waived.² While under the statutes of California³ the due incorporation of a corporation can not be inquired

¹ *Clearwater v. Meredith*, 68 U. S. (1 Wall.) 25, sub nom. *Ferguson v. Meredith*, 17 L. Ed. 604.

² *Id.*

³ *California Steam Nav. Co. v. Wright*, 8 Cal. 585; *White v. Moses*, 11 Cal. 69; *Dillaye v. Parks*, 31 Barb. (N. Y.) 132; *Society for Propagation of Gospel v. Pawlet, Town of*, 29 U. S. (4 Pet.) 480, 7 L. Ed. 927; *Philadelphia W. & B. R. Co. v. Quigley*, 62 U. S. (21 How.) 202, 16 L. Ed. 73.

² *Conrad v. Atlantic Ins. Co.*, 26

U. S. (1 Pet.) 386, 7 L. Ed. 189, affirming 4 Wash. C. C. 662, Fed. Cas. No. 627; *Society for the Propagation of the Gospel v. Pawlet, Town of*, 29 U. S. (4 Pet.) 480, 7 L. Ed. 927; *Yeaton v. Lynn, Use of Lyles*, 30 U. S. (5 Pet.) 224, 8 L. Ed. 105, affirming 3 Cr. C. C. 182, Fed. Cas. No. 8642.

³ *Kerr's Cyc. Cal. Civil Code*, § 358. See: *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236; *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

into collaterally, yet a private person is not thereby precluded from denying that it is a corporation *de jure* or *de facto*.⁴ An averment of the existence of a *de facto* corporation is as issuable as an averment of the existence of a corporation *de jure*.⁵

Where the defendants are sued by a corporate name, though the complaint does not allege that the defendants are incorporated, still plaintiff must prove the fact if denied, and a denial that defendants are a corporation is not new matter.⁶ Where a complaint against a corporation does not allege the corporate character of the defendant, objection thereto is waived by the defendant's plea of counter-claim as though it were in fact a corporation.⁷ Before the Revised Statutes of New York, the denial of incorporation amounted only to the general issue.⁸ And it was equally bad when applied to foreign corporations.⁹ But under the Revised Statutes, to require a domestic corporation plaintiff to prove its corporate organization, the defendant must specially plead the non-existence of such corporation; and this plea was a good plea in bar.¹⁰ Plea of the general issue at common law does not put in issue the averment of a declaration that the plaintiff is a corporation.¹¹ But such a denial can

⁴ Oroville & Virginia City R. R. Co. v. Plumas County, 37 Cal. 360; Roman Catholic Orphan Asylum v. Abrams, 40 Cal. 455; Zion Methodist Episcopal Church v. Hillery, 51 Cal. 155; Dean v. Davis, 51 Cal. 407.

⁵ Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

⁶ Stoddard v. Onondaga Annual Conference, 12 Barb. (N. Y.) 573.

⁷ Frost v. Ainslie Lumber Co., 3 Wash. 241, 28 Pac. 354, 915.

⁸ Hartford Bank v. Murrell, 1 Wend. (N. Y.) 87; Welland Canal Co. v. Hathaway, 8 Wend. (N. Y.)

480, 24 Am. Dec. 51; Wood v. Jefferson County Bank, 9 Cow. (N. Y.) 194.

⁹ Farmers & Mechanics' Bank v. Rayner, 2 N. Y. Super. Ct. Rep. (2 Hall) 195.

¹⁰ Methodist Episcopal Church v. Tyron, 1 Den. (N. Y.) 451. See, also: Bank of Genesee v. Patchin Bank, 13 N. Y. 309; Park Bank v. Tilton, 15 Abb. Pr. (N. Y.) 384.

¹¹ Savings Bank v. Ford, 27 Conn. 282, 71 Am. Dec. 66; Arnau v. First Nat. Bank, 36 Fla. 398, 18 So. 786; Rockland, Mt. D. & S. Steam-Boat Co. v. Sewall, 78 Me. 167, 3 Atl. 181.

¹ Code Pl. and Pr.—97

not be made on information and belief.¹² To put the plaintiff to proof of his corporate capacity in the case, a general denial is not sufficient, but the answer must deny the existence of such a corporation.¹³ If evidence is required on that point, it must be because that is a point in issue; and it can not be in issue unless it is affirmed in the pleadings on one side and denied on the other.¹⁴ The rule which requires a defendant to answer positively as to the facts alleged in a verified complaint, which are presumptively within his own knowledge, applies to municipal corporations. The statute makes no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons.¹⁵ There may exist the best reasons for a different rule of pleading when a municipal corporation is a defendant; but the courts can make no distinction, because the code makes none. It is a matter for the legislature, and not for the court.¹⁶ Where the complaint averred a contract between plaintiff and the board of supervisors, on behalf of the county, and the answer admitted a contract between the plaintiff and another on the one side, and the county on the other, and averred that this was the only contract made by the county in relation to the matter, and denied that any other was made by the board of supervisors, it was held that this denial was sufficient to put the plaintiff on proof of the contract.¹⁷ In an action against a corporation to recover dividends which have accrued on its stock, if the plaintiff avers "that from a date named she was, has been, and still is the owner in

¹² *East River Bank v. Rogers*, 20 N. Y. Super. Ct. Rep. (7 Bosw.) 493.

¹³ *Bank of Havana v. Wickham*, 7 Abb. Pr. (N. Y.) 134, 16 How. Pr. 97; affirmed, 20 N. Y. 355; *Park Bank v. Tilton*, 15 Abb. Pr. 384.

¹⁴ Ang. & Ames on Corp. 631, and cases cited; *Oroville & Vir-*

ginia City R. Co. v. Plumas County Supervisors, 37 Cal. 362.

¹⁵ *San Francisco Gas Co. v. San Francisco, City of*, 9 Cal. 453.

¹⁶ *San Francisco Gas Co. v. San Francisco, City of*, 9 Cal. 458.

¹⁷ *Murphy v. Napa County*, 20 Cal. 497.

her own right, and as her separate property, of the stock," the answer raises an issue, if it denies that at the date named "the plaintiff was, has since been, or still is the owner in her own right, and as her separate property," of the stock. The qualifications of the denial by the words "in her own right and as her separate property" are mere surplusage.¹⁸ Where the answer in a suit against a corporation, on its note, relies simply on the want of power of the corporation to issue notes, the defendant can not afterwards object that the plaintiff has not shown that the officers executing the note were empowered by the corporation to do so.¹⁹ Noncompliance with the statutory provision,²⁰ that unless a corporation files a copy of its articles in the county where the property is situated, it "shall not maintain or defend any action or proceeding in relation to such property," is a matter to be set up by the defendant in an action of ejectment brought by the corporation for the property. A denial of the existence of the corporation does not raise the question.²¹ Such failure on the part of the corporation can only be made available by specially pleading it in the answer as matter of abatement to the action.²² This provision of the statute applies only to domestic corporations.²³ Where the defendant was sued as a corporation when it was in fact a limited copartnership, a denial that "defendant is or ever was a corporation, organized and existing under the laws of England," is pregnant with the admission that the defendant is a corporation, and raises no issue.²⁴ Where an answer denies the authority of the president of a corporation to execute a certain mortgage, but does not deny the facts consti-

¹⁸ *Dow v. Gould & Curry Min. Co.*, 31 Cal. 630.

¹⁹ *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1.

²⁰ *Kerr's Cyc. Cal. Civil Code*, § 299.

²¹ *Southern Pac. R. Co. v. Purcell*, 77 Cal. 69, 18 Pac. 886.

²² *South Yuba Water & Min. Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222.

²³ *Id.*

²⁴ *Wright v. Fire Ins. Co.*, 12 Mont. 474, 31 Pac. 87.

tuting a ratification of his acts, the plaintiffs are entitled to judgment without proof of the president's original authority.²⁵

§ 1163. ——— DISSOLUTION. We have already seen that a corporation can not defeat the rights of its creditors by simply going out of business;¹ and there are cases to the effect that an action by a corporation is not abated by the dissolution of the corporation, but that the action may be continued in the name of the corporation,² while other cases are to the effect that the action is merely suspended for the want of a plaintiff, and that a judgment rendered in favor of the dissolved corporation is not void, but voidable merely, and enforceable by a new corporation acquiring all the assets of the defunct corporation, including such judgment and the cause of action upon which it was rendered.³ At common law, suits by or against a corporation abate upon its dissolution;⁴ and according to the well-established doctrine by the large preponderance of cases in this country, in the absence of a statutory regulation, the expiration of corporate life, either by the lapse of the limitation in its charter or by court decree of dissolution, works an abatement of all pending actions at law or in equity by or against it, on the ground that its existence as a legal entity is ended, and for that reason any judgment subsequently rendered for or against it will be void.⁵

²⁵ *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 34 Pac. 527.

¹ See, ante, § 1111, footnote 9.

² *Talmage v. Pell*, 9 Pal. Ch. (N. Y.) 410; *New York Marbled Iron Works v. Smith*, 11 N. Y. Super. Ct. (4 Duer) 362; *Pendleton v. Russell*, 144 U. S. 640, 36 L. Ed. 574, 12 Sup. Ct. Rep. 743, affirming 106 N. Y. 619, 13 N. E. 447.

³ *Kelley v. Rochelle* (Tex. Civ. App.), 93 S. W. 164.

⁴ See: *Norwood, In re*, 32 Hun (N. Y.) 196; *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227.

⁵ *Venable Brothers v. Southern Granite Co.*, 135 Ga. 508, 32 L. R. A. (N. S.) 446, 69 S. E. 822.

Full collection of authorities in note in 32 L. R. A. (N. S.) 446-453.

§ 1164. ——— ESTOPPEL.—IN GENERAL. As a general rule, corporations have power to waive their rights, and are bound by estoppels in pais like natural persons.¹ When an association assumes a name and exercises the powers of a corporation it is estopped from denying its corporate liabilities.² A corporation which has entered into contracts in its corporate capacity is estopped, when sued thereon, from denying its corporate existence.³ Where defendant accepted the office of treasurer of an incorporation, and served for several years as such, he was estopped from denying its corporate existence.⁴ One entering into a contract with a corporation is estopped from setting up in an action upon such contract that the corporation was not legally formed.⁵

§ 1165. ——— HOW AVAILED OF: PLEADING. Whether an estoppel,—of a corporation or a natural person,—must be pleaded in order to be availed of, and if so, how it shall be pleaded, are questions not free from serious difficulties in the decided cases. The common-law cases are hopelessly irreconcilable. Some of the cases hold that an estoppel in pais need not be pleaded,¹

¹ *Hale v. Union Ins. Co.*, 32 N. H. 295, 64 Am. Dec. 370.

² *United States Express Co. v. Bedbury*, 34 Ill. 459.

³ *Snider's Sons Co., Louis. v. Troy*, 91 Ala. 224, 24 Am. St. Rep. 387, 11 L. R. A. 515, 8 So. 658; *Callender v. Painesville & Hudson River R. R. Co.*, 11 Ohio St. 516.

⁴ *Parrott v. Byers*, 40 Cal. 614; *Dutchess Cotton Mfy. v. Davis*, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459; *All Saints' Church v. Lovett*, 1 N. Y. Super. Ct. Rep. (1 Hall) 191.

⁵ *IND. TR.—Western Invest. Co. v. Davis*, 7 Ind. Tr. 172, 15 Ann. Cas. 1134, 104 S. W. 573. KY.—*Johnson v. Mason Lodge No. 33*,

I. O. O. F., 106 Ky. 846, 51 S. W. 620. N. Y.—*White v. Ross*, 4 Abb. Ct. App. Dec. 589, 15 Abb. Pr. 66; *Steam Nav. Co. v. Weed*, 17 Barb. 378; *White v. Coventry*, 29 Barb. 305; *Hyatt v. Whipple*, 37 Barb. 595; *Hyatt v. Esmond*, 37 Barb. 601; *Cooper v. Shaver*, 41 Barb. 151; *Palmer v. Lawrence*, 5 N. Y. Super. Ct. Rep. (3 Sandf.) 170; affirmed, 5 N. Y. 389. WASH.—*American Radiator Co. v. Kinnear*, 56 Wash. 213, 35 L. R. A. (N. S.) 456, 105 Pac. 630.

Compare: *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51.

See note 24 Am. Dec. 59.

1 CONN.—*Shaefer Jr. & Co.*

some that it can not be pleaded,² and others that it must be pleaded.³ The rule in those jurisdictions in which reformed procedural code or statutes have been adopted, is that, to be available as a defense to the cause of action, estoppel must be especially pleaded, where there is an opportunity offered to do so;⁴ and if not so pleaded is

John V., v. Ely, 94 Conn. 501, Ann. Cas. 1912D, 899, 80 Atl. 775. MINN.—*Caldwell v. Auger*, 7 Minn. 217, 77 Am. Dec. 515; *Coleman v. Pearce*, 26 Minn. 123, 126, 1 N. W. 846. MISS.—*Turnipseed v. Hudson*, 50 Miss. 429, 19 Am. Rep. 15. ENG.—*Freeman v. Cooke*, 3 Exch. 114, 6 Dow. & L. 187, 11 Eng. Rul. Cas. 82.

See notes, 77 Am. Dec. 519; 5 Am. St. Rep. 28; 27 Am. St. Rep. 344; 11 Eng. Rul. Cas. 94-104.

² *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51.

³ *Dean v. Crall*, 98 Mich. 591, 39 Am. St. Rep. 571, 57 N. W. 813; *Cockrill v. Hutchinson*, 135 Mo. 67, 58 Am. St. Rep. 564, 36 S. W. 375.

⁴ *Id.*; See, among other cases: ALA.—*Hall v. Henderson*, 126 Ala. 449, 85 Am. St. Rep. 53, 61 L. R. A. 621, 28 So. 531. CAL.—*Clarke v. Huber*, 25 Cal. 593; *Davis v. Davis*, 26 Cal. 23, 85 Am. Dec. 157; *Elcheborne v. Auzeais*, 45 Cal. 121; *McKeen v. Naughton*, 88 Cal. 462, 26 Pac. 354; *Newhall v. Hatch*, 134 Cal. 269, 65 L. R. A. 673, 66 Pac. 266. COLO.—*De Votie v. McGerr*, 15 Colo. 467, 22 Am. St. Rep. 426, 24 Pac. 923; *Gaynor v. Clements*, 16 Colo. 209, 26 Pac. 324; *Davidson v. Jennings*, 27 Colo. 187, 83 Am. St. Rep. 49, 60 Pac. 354. IND.—*Wood v. Ostram*, 29 Ind. 177; *Robbins v. Magee*, 76 Ind. 381;

Simms v. Frankfort, City of, 79 Ind. 446; *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394; *Delhi, City of, v. Startzman*, 104 Ind. 343, 3 N. W. 937; *Webb v. John Hancock Mut. Life Ins. Co.*, 162 Ind. 616, 66 L. R. A. 632, 69 N. E. 1006. IOWA—*Ransom v. Stanberry*, 22 Iowa 334; *Phillips v. Van Schaick*, 37 Iowa 229; *Burlington, Independent District of, v. Merchants' Nat. Bank*, 68 Iowa 343, 27 N. W. 255; *Cloud v. Malvin*, 108 Iowa 52, 45 L. R. A. 209, 75 N. W. 645, 78 N. W. 791. KAN.—*Dwelling-House Ins. Co. v. Johnson*, 47 Kan. 1, 27 Pac. 100. KY.—*Stevenson v. Miller*, 12 Ky. (2 Litt.) 306, 13 Am. Dec. 271. LA.—*Wood's Heirs v. Nicholls*, 33 La. Ann. 744. MICH.—*Dale v. Turner*, 34 Mich. 405. MO.—*Bray v. Marshall*, 75 Mo. 327; *Noble v. Blount*, 77 Mo. 235; *Nammerslough v. Cheatham*, 84 Mo. 13; *State v. East Fifth St. R. Co.*, 140 Mo. 539, 62 Am. St. Rep. 742, 38 L. R. A. 218, 41 S. W. 955; *Turner v. Edmonston*, 210 Mo. 711, 124 Am. St. Rep. 739, 109 S. W. 33. MONT.—*Eisenhauer v. Quinn*, 36 Mont. 368, 123 Am. St. Rep. 370, 14 L. R. A. (N. S.) 435, 93 Pac. 33. NEB.—*Burlington & M. R. Co. v. Harris*, 8 Neb. 140; *Erickson v. Oakland First Nat. Bank*, 44 Neb. 622, 48 Am. St. Rep. 753, 28 L. R. A. 577, 62 N. W. 1078; *Muller v. Stoecker Cigar Co., Wm. F.*, 89 Neb. 438, 34 L. R. A. (N. S.) 753,

deemed to have been waived.⁵ But where there has been no opportunity to plead the estoppel, or it is of such a nature that it can not be pleaded,—e. g., where the estoppel does not go to defeat the cause of action, but only to the evidence by which the cause of action is to be maintained,—and being of matters in pais, the defense may be availed of without being pleaded;⁶ if objection is not made to the evidence when offered, however, on the ground of estoppel, the defense is deemed waived.⁷

An estoppel in pais is new matter, and can not be relied upon in evidence as a defense without being specially pleaded.⁸ The party claiming an estoppel in pais, and

131 N. W. 923. NEV.—Hanson v. Chiativich, 13 Nev. 395. N. Y.—Krekeler v. Ritter, 12 N. Y. 372; Tallman v. Varick, 5 Barb. 277; Dresler v. Hard, 57 N. Y. Super. Ct. Rep. (25 Jones & S.) 192, 6 N. Y. Supp. 500; reversed on another point in 127 N. Y. 235, 12 L. R. A. 456, 27 N. E. 823. OHIO—Fanning v. Hibernia Ins. Co., 37 Ohio St. 344; Meiss v. Gill, 44 Ohio St. 253. OKLA.—Cooper v. Flesner, 24 Okla. 47, 20 Ann. Cas. 29, 23 L. R. A. (N. S.) 1180, 103 Pac. 1016; Nance v. Oklahoma Fire Ins. Co., 31 Okla. 208, 38 L. R. A. (N. S.) 426, 120 Pac. 948. ORE.—Rugh v. Ottenhelmer, 6 Ore. 231, 25 Am. Rep. 513. TENN.—Turley v. Turley, 85 Tenn. 251, 1 S. W. 891; Jourolmon v. Massengill, 86 Tenn. 81, 5 S. W. 719. VT.—Isaacs v. Clark, 12 Vt. 692, 36 Am. Dec. 372; Gray v. Pingre, 17 Vt. 419, 44 Am. Dec. 345. WIS.—Cill v. Rice, 13 Wis. 549; Waddle v. Morrill, 26 Wis. 611; Warder v. Baldwin, 51 Wis. 450.

⁵ See Pomeroy Code Remedies and Remedial Rights, § 712; 10 R. C. L., p. 842, § 148.

⁶ See: CAL.—Flandreau v. Downey, 23 Cal. 354; Clink v. Thurston, 47 Cal. 21. IOWA—Phillips v. Blair, 38 Iowa 649. MINN.—Caldwell v. Auger, 4 Minn. 217, 77 Am. Dec. 515; Coleman v. Pearce, 26 Minn. 123, 1 H. W. 486. MISS.—Turnipseed v. Hudson, 50 Miss. 429, 19 Am. Rep. 15. NEB.—Towne v. Sparks, 23 Neb. 142, 36 N. W. 375. N. Y.—Wood v. Jackson, 8 Wend. 9, 22 Am. Dec. 603. S. C.—Lites v. Addison, 27 S. C. 226, 3 S. E. 214. TEX.—Mayer v. Ramsey, 46 Tex. 371. VA.—Davis v. Thomas, 5 Leigh. 1; Hayes v. Virginia Mutual Protective Assoc., 76 Va. 225. WIS.—Gans v. St. Paul Fire & Marine Ins. Co., 43 Wis. 108, 28 Am. Dec. 535. ENG.—Freeman v. Cooke, 2 Exch. 654, 18 L. J. Exch. 114.

⁷ See Hanson v. Buckner, 34 Ky. (4 Dana) 251, 29 Am. Dec. 401.

⁸ De Votie v. McGerr, 15 Colo. 467, 22 Am. St. Rep. 426, 24 Pac. 923; Gaynor v. Clements, 16 Colo. 209, 26 Pac. 324; Prewitt v. Lambert, 19 Colo. 7, 34 Pac. 684; Bruce v. Phoenix Ins. Co., 24 Ore. 486, 34 Pac. 16.

relying upon it as a defense, should set out the matters constituting it in his answer.⁹ Such is the rule generally in those states which have adopted the reformed procedure.¹⁰ Likewise, an estoppel by deed or record must be pleaded to be available either as a cause of action or as a defense.¹¹ But it is not true that in all cases to be available an estoppel must be strictly pleaded as such. If the facts constituting the estoppel are in any way sufficiently pleaded, the party is entitled to the benefit of the law arising therefrom.¹² And the sufficiency of the manner in which an estoppel is pleaded will not be reviewed on appeal, where the plea was treated at the trial as properly made and sufficient.¹³ In replevin, evidence of matter in estoppel may be given and availed of as a defense under a general denial and without being pleaded specially. So held by the Nebraska court.¹⁴

§ 1166. ——— ESSENTIAL ALLEGATIONS. An answer setting up that another party than the plaintiff is the real party in interest, should allege facts which would show as a matter of law that another person should have brought the suit.¹ An answer should allege the facts, showing why the plaintiff is not a real party in interest.² But it is not necessarily frivolous if it does not.³ The answer

⁹ *McKeen v. Naughton*, 88 Cal. 462, 26 Pac. 354; *Troyer v. Dyar*, 102 Ind. 396, 1 N. E. 728.

¹⁰ *Churchill v. Baumann*, 95 Cal. 541, 30 Pac. 770; *Burlington Independent Dist. v. Merchants' Bank*, 68 Iowa 343, 27 N. W. 255; *Tyler v. Hall*, 106 Mo. 313, 27 Am. St. Rep. 337, 17 N. W. 319; *Central Nat. Bank v. Doran*, 109 Mo. 40, 18 S. W. 836; *Knudsen v. Omanson*, 10 Utah 124, 37 Pac. 250; *Walker v. Baxter*, 6 Wash. 244, 33 Pac. 426; *Warder v. Baldwin*, 51 Wis. 450, 8 N. W. 257.

¹¹ *Bays v. Trulson*, 25 Ore. 109, 35 Pac. 26.

¹² *City Nat. Bank v. Thomas*, 46 Neb. 861, 65 N. W. 895; *Miss v. Gill*, 44 Ohio St. 253; *Wachter v. Phoenix Assn. Co.*, 132 Pa. St. 428, 19 Am. St. Rep. 600, 19 Atl. 289.

¹³ *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386.

¹⁴ *Towne v. Sparks*, 23 Neb. 142, 36 N. W. 375.

¹ *Raymond v. Pritchard*, 24 Ind. 318.

² *Russell v. Clapp*, 3 N. Y. Code Rep. 64, 7 Barb. 482, 4 How. Pr. 347; *Fosdick v. Groff*, 22 How. Pr. 158.

³ *Tamisier v. Cassard*, 17 Abb. Pr. (N. Y.) 187.

is not frivolous for neglecting to name the assignee, or designating him as John Doe.⁴ If it appears by the pleadings that the assignment was in trust, it should be also alleged that the assignee accepted it.⁵ A plea entirely addressed to the right to recover of a third person for whose use the suit is brought is bad on demurrer.⁶ So, on the ground that the title of the plaintiff is merely colorable.⁷ A plea to the jurisdiction on the ground that a demand has been colorably assigned, in order to evade a discharge under the Insolvent Law, is not to be treated as dilatory and captious.⁸ The objection that the plaintiff is not the real party in interest must be set up in the answer, to enable defendant to rely upon it, or it will be unavailing on the trial, even if the fact should appear from the examination of witnesses.⁹ But if it appear from the face of the complaint that defendant is not the real or true party plaintiff, then the objection should be made by demurrer.

§ 1167. — WANT OF CONSIDERATION—HOW PLEADED. In pleading failure of consideration, an issue of law must not be tendered.¹ An answer of an entire or partial failure of consideration, which does not set out the facts showing the failure, or how much the whole consideration for the property was, and gives no data by which the court can determine what deduction, if any, should be made, is bad.² As against a bona fide purchaser for

⁴ *Smith v. Mead*, 14 Abb. Pr. (N. Y.) 262; *Metropolitan Bank v. Lord*, 11 N. Y. Super. Ct. Rep. (4 Duer) 630, 1 Abb. Pr. 185.

⁵ *Whitlock v. Fiske*, 3 Edw. Ch. (N. Y.) 131.

⁶ *Sydam v. Cannon*, 1 Houst. (Del.) 431.

⁷ *Boyreau v. Campbell*, 1 McAll. 119, Fed. Cas. No. 1760.

⁸ *Wallace v. Clark*, 3 Woodb. & M. 359, Fed. Cas. No. 17098.

⁹ *Jackson v. Whedon*, 1 E. D. Smith (N. Y.) 141; *Savage v. Corn Exchange, F. & I. Nav. Ins. Co.*, 17 N. Y. Super. Ct. Rep. (4 Bosw.) 1; affirmed, 36 N. Y. 655.

Compare: *Swift v. Swift*, 46 Cal. 266.

¹ *Bennett v. Martin*, 6 Mo. 460; *Hammond v. Earle*, 58 How. Pr. (N. Y.) 426.

² *Carmelich v. Mims*, 88 Ala. 335, 6 So. 913; *Billan v. Hecklebrath*, 23 Ind. 71; *Nixon v. Beard*,

value before maturity of negotiable paper, failure of consideration without notice constitutes no defense to the action.³ An answer setting up in defense a failure to perform an agreement to execute an indemnifying bond is bad when it does not set forth an injury resulting from such failure, but shows that injury can never happen.⁴ All matters in confession and avoidance, showing that the contract sued upon was void or voidable in point of law, must be affirmatively pleaded.⁵ It seems that illegality in a contract sued on, though shown by the testimony, can not avail the defendant, unless it is alleged in the pleadings; and that an allegation in the answer that the contract was illegal, coupled with an enumeration in the same paragraph of specific grounds of illegality, does not entitle the defendant to prove any grounds of illegality not so specified.⁶ The facts showing illegality must be specially pleaded in the answer, if the complaint does not disclose the illegality.⁷ If it should appear from the testimony of plaintiff's witnesses that the contract in question is illegal or immoral, the court ought to dismiss the proceedings of its own motion on grounds of public policy, even though no such defense has been pleaded.⁸

A plea seeking to avoid bond for being illegally taken, should specially state all the facts which show that illegality.⁹ If any part of a single consideration for one or

111 Ind. 137, 12 N. E. 131; Moore v. Alston, 4 Tex. App. 478.

³ Rand v. Pantagraph Co., 1 Colo. App. 270, 28 Pac. 661.

⁴ Billan v. Hecklebrath, 23 Ind. 71.

⁵ Finley v. Quirk, 9 Minn. 184.

⁶ Gushee v. Leavitt, 5 Cal. 161; Dingeldein v. Third Ave. R. Co., 22 N. Y. Super. Ct. Rep. (9 Bosw.) 79; reversed on another point, 37 N. Y. 575, 5 Transc. App. 155.

⁷ CAL.—Sharon v. Sharon, 68

Cal. 29; Morrill v. Nightingale, 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068. ORE.—Buchtel v. Evans, 21 Ore. 315, 28 Pac. 67; Jameson v. Coldwell, 23 Ore. 144, 31 Pac. 279. TEX.—Heffron v. Pollard, 73 Tex. 96, 15 Am. St. Rep. 764, 11 S. W. 165. WASH.—Lyts v. Keevey, 5 Wash. 606, 32 Pac. 534.

⁸ Ah Doon v. Smith, 25 Ore. 89, 64 Pac. 1093; Irving v. McWilliams, 1 N. B. Eq. 217.

⁹ United States v. Sawyer, 1 Gall. 86, Fed. Cas. No. 16227.

more objects, or of several considerations for a single object, is unlawful, the entire contract is void.¹⁰ That is not lawful which is contrary to an express provision of law; or contrary to the policy of express law, though not expressly prohibited; or otherwise contrary to good morals.¹¹ An answer setting up for defense a failure of consideration must show whether it is a partial or total failure.¹²

A partial failure of consideration can not be pleaded in bar of an action upon a note given for the purchase money of land.¹³ It is generally no defense to a promissory note.¹⁴ Partial failure of consideration could not be given in evidence, unless specially pleaded.¹⁵ Where the obligor of a single bill was sued by an assignee, and pleaded that the bill was given for the purchase of horses which were not as sound nor of as high a pedigree as had been represented by the seller, such a plea was admissible.¹⁶

§ 1168. ——— ESSENTIAL ALLEGATIONS. Defenses in abatement of the suit, or going to the jurisdiction being preliminary in their nature, must be taken advantage of by plea, and can not be taken advantage of in a general answer, which necessarily admits the right and capacity of the party to sue.¹ The fact that a corporation aggregate appears and pleads by attorney to the jurisdiction is not a waiver of the objection.² The question of jurisdic-

¹⁰ Kerr's Cyc. Cal. Civil Code, § 1608.

¹¹ Id., § 1667.

Certain contracts unlawful and void. See Id., §§ 1668-1676.

¹² Clough v. Murray, 19 Abb. Pr. 97.

¹³ Reese v. Gordon, 19 Cal. 147.

¹⁴ Varnum v. Mauro, 2 Cr. C. C. 425, Fed. Cas. No. 16889.

¹⁵ Wallace v. Boston, 10 Mo. 660. Under New Mexico practice, in

a suit on a promissory note, a partial failure of consideration may be proved under the general issue, and is a good defense pro tanto.—Staab v. Ortiz, 3 N. Mex. 53, 1 Pac. 857.

¹⁶ Withers v. Greene, 50 U. S. (9 How.) 213, 13 L. Ed. 109.

¹ Livingston v. Story, 36 U. S. (11 Pet.) 351, 9 L. Ed. 746.

² Commercial & Railroad Bank v. Slocomb, 39 U. S. (14 Pet.) 60, 10 L. Ed. 354.

tion arising in a case where a mortgagor and mortgagee were citizens of the same state, and the mortgagee had assigned the mortgage to a citizen of another state, should have been raised by a plea in abatement. Upon a trial of the merits it is too late.³ A plea to the jurisdiction in equity is like a plea in abatement at law, which can not be put in after a general imparlance, or be received when it does not give the plaintiff a better writ.⁴ The objection that a court of equity has not jurisdiction of the suit, because complainant has an adequate remedy at law, should be taken by plea or answer. It is too late to raise it for the first time upon appeal, unless the want of jurisdiction is apparent on the face of the bill.⁵ A defendant who is sued out of his district may plead his personal privilege.⁶ The exemption of a foreign consul from any action against him in a state court, however, is not a personal privilege, but a matter of jurisdiction, and is not waived by the failure of the defendant to plead it.⁷

A plea in abatement, denying the truth of the averments as to residence, etc., in the present tense instead of in the past tense, so as to make issue with reference to the time of the commencement of the suit, is not so clearly frivolous as to require the court to set it aside or disregard it.⁸ Where the jurisdiction of the Circuit Court of the United States appears by proper averments upon the record, the defendant can only impugn it on a special plea; the objection can not be taken by answer.⁹ This defense is sustainable only where the person is not subject to the jurisdiction of the court, and not where the objection is merely that original process has not been

³ Smith v. Kernochen, 48 U. S. (7 How.) 198, 12 L. Ed. 666.

⁴ Baker v. Biddle, 1 Baldw. 394, Fed. Cas. No. 764.

⁵ Wylle v. Coxe, 56 U. S. (15 How.) 415, 14 L. Ed. 753.

⁶ Teese v. Phelps, 1 McAll. 17, Fed. Cas. No. 13818.

⁷ Miller v. Van Loben Sels, 66 Cal. 341, 5 Pac. 512.

⁸ Eberly v. Moore, 62 U. S. (24 How.) 147, 16 L. Ed. 612; Horner v. Keppel, 10 Ad. & El. 17.

⁹ Wickliffe v. Owings, 58 U. S. (17 How.) 47, 15 L. Ed. 44.

duly served.¹⁰ If a plea to the jurisdiction and a plea non assumpsit be put in, and the issue be made up on the latter plea only, no notice being taken of the former, and upon this state of the pleadings the cause goes on trial, the plea to the jurisdiction is considered as waived.¹¹

Entering upon trial and contesting a cause upon its merits, a party waives all objections to the jurisdiction of the court by reason of the manner in which the cause was brought before it.¹²

§ 1169. — WANT OF JURISDICTION—ESSENTIAL ALLEGATIONS. A plea to the jurisdiction must be direct and certain, and must set out the facts which go to show a want of jurisdiction in the court,¹ either (1) of the subject-matter of the action, or (2) of the person of the defendant.² The question of the jurisdiction, it has been said, can not be raised under a general denial, but that it must be especially pleaded,³ unless it be in those cases in which the subject-matter of the action is not within the jurisdiction of the court, in which cases the infirmity can always be reached and the exception taken under the general issue, or its equivalent in the procedural code

¹⁰ *Nones v. Hope Mutual Life Ins. Co.*, 8 Barb. (N. Y.) 541, 3 N. Y. Code Rep. 161, 5 How. Pr. 96; *Bridge v. Payson*, 8 N. Y. Super. Ct. Rep. (1 Duer) 614.

¹¹ *Bailey v. Dozier*, 47 U. S. (6 How.) 23, 12 L. Ed. 328.

In California, the matter is controlled by statute. See Kerr's Cyc. Cal. Code Civ. Proc., § 434.

¹² *Colorado Cent. R. Co. v. Caldwell*, 11 Colo. 545, 19 Pac. 542; *Schoolfield v. Brunton*, 20 Colo. 139, 36 Pac. 1103; *Potter v. Neal*, 62 How. Pr. (N. Y.) 158; affirmed, 31 Hun 86.

¹ Ill.—*Welch v. Sykes*, 8 Ill. (3 Gilm.) 197, 44 Am. Dec. 689; *Diblee v. Davison*, 25 Ill. 486. N. J.—

Moulin v. Trenton Mut. L. & F. Ins. Co., 24 N. J. L. (4 Zab.) 222; *Price v. Ward*, 25 N. J. L. (Dutch.) 225. N. Y.—*Shumway v. Stillman*, 4 Cow. 292, 15 Am. Dec. 374. WASH.—*Ritchie v. Carpenter*, 2 Wash. 512, 26 Am. St. Rep. 877, sub nom. *Carpenter v. Ritchie*, 28 Pac. 380. FED.—*Hill v. Mendenhall*, 88 U. S. (21 Wall.) 453, 22 L. Ed. 616.

² See, ante, §§ 68-73.

³ *Ritchie v. Carpenter*, 2 Wash. 512, 26 Am. St. Rep. 877, sub nom. *Carpenter v. Ritchie*, 28 Pac. 380; *Eberly v. Moore*, 62 U. S. (24 How.) 147, 16 L. Ed. 612; *Abby, The*, 1 Mason 360, Fed. Cas. No. 14; *Teese v. Phelps*, 1 McAll. 17, Fed. Cas. No. 13818.

states, because in such a case any action of the court is admittedly a nullity, and objection on the ground of a want of jurisdiction in the court over the subject-matter can be taken at any time, either during the progress of the cause in the trial or the appellate court, or after judgment even;⁴ and the same infirmity in the want of jurisdiction in the court over the person of the defendant is thought to give a like right, except that the acts and judgment of the court will not be a nullity, being voidable only, because if the court has jurisdiction of the subject-matter it is entitled to act, until want of jurisdiction of the person is made to appear,—such as a want of service of process, or a false and fraudulent return of process by the sheriff.⁵ Want of jurisdiction in the court may be shown,—where the infirmity has not been waived by some positive act or proceeding on the part of the defendant,—even to the extent of contradicting an express record of a court.⁶ A plea to the jurisdiction, on account of limited jurisdiction, is a plea in bar.⁷ Although a plea in bar admits the jurisdiction, the court has power, after such a plea has been put in, to permit the defendant to withdraw it, and plead in abatement a denial that the averments relied on to show jurisdiction were true. It is proper to give leave to amend, thus, where the defendant shows by affidavit that the averments as to jurisdiction were false and fraudulent.⁸

Judgment in another state or country sued upon, want of jurisdiction of the court rendering such judgment may be shown by the defendant, even where to do so he is required to impeach the express record of the court in such other state or country;⁹ but an attempt to set up affirma-

⁴ See *Maissenaire v. Keating*, 2 Gall. 325, Fed. Cas. No. 8978.

⁵ See, ante, §§ 144 et seq., 156 et seq., 213.

⁶ *Ritchie v. Carpenter*, 2 Wash. 512, 28 Am. St. Rep. 877, sub nom. *Carpenter v. Ritchie*, 28 Pac. 380.

⁷ *Smith v. McCleod*, 1 Cr. C. C. 43, Fed. Cas. No. 13073.

⁸ *Eberly v. Moore*, 62 U. S. (24 How.) 147, 16 L. Ed. 612.

⁹ *Ritchie v. Carpenter*, 2 Wash. 512, 26 Am. St. Rep. 877, sub nom. *Carpenter v. Ritchie*, 23 Pac. 380.

tively the plea of want of jurisdiction in the court in which the judgment was rendered, which is, in effect, but a plea of nul tiel record, is insufficient.¹⁰ Thus, where, in an action on such a judgment, the attempted plea to the jurisdiction, merely denied that the court of the foreign state or country in which the judgment was rendered had jurisdiction, and denied that a cause of action ever existed, merely states conclusions of law, and is insufficient.¹¹

In Massachusetts, it seems, following the common-law rule, a plea to the jurisdiction should show that some other court in the same state has jurisdiction.¹²

¹⁰ Id.

¹¹ Id.

¹² *Lawrence v. Smith*, 5 Mass,

362. See: *Otis v. Wakeman*, 1 Hill (N. Y.) 604; *King, The, v. Johnson*, 6 East 583, 600.

CHAPTER X.

ANSWER—NEW MATTER: COUNTER-CLAIM, SET-OFF, CROSS-COMPLAINT.

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- § 1198. ——— What is, and what is not, a cross-complaint.

§ 1170. IN GENERAL. We have already seen that under the reformed judicature the plaintiff is required to state

the facts that constitute his cause of action;¹ and it is manifestly the intention of the procedural codes to adopt the true and just rule by requiring that the defendant must (1) deny the facts alleged in the complaint which he wishes to controvert, or (2) confess and avoid them. Thus, the California procedural code provides that the answer of the defendant shall contain: (1) A general or (2) a special denial of the facts controverted by him,² and (3) a statement of any new matter constituting a defense or a counter-claim.³ This latter clause relates exclusively to new affirmative matter; and, as all distinctions in the forms of actions are abolished,⁴ requiring merely a simple statement of the facts constituting a cause of action or of defense, the two classes of defenses permitted as above set out,—that is, denials, either general or special, and new matter,—must be the same in all cases.⁵ It is certain that where new matter exists, of which the defendant wishes to avail himself as a defense to the action, it must be stated in the answer. The language of the statute is plain and unequivocal; the words leave no room for any question or doubtful construction. The new matter, whatever it may be, must be set up in the answer,⁶ even though it be first disclosed by the plaintiff's evidence.⁷

¹ See, ante, §§ 826 et seq.

² See, ante, § 1040.

As to defenses generally, see, ante, §§ 1047-1055.

As to special pleas or answers, see, ante, §§ 1097-1169.

³ Kerr's Cyc. Cal. Code Civ. Proc., § 437, subd. 2.

⁴ See, ante, §§ 29, 30.

⁵ *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692.

⁶ CAL.—*Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692; *Glazer v. Clift*, 10 Cal. 304; *Coles v. Soulsby*, 21 Cal. 50; *Moss v. Shear*, 30 Cal. 472. IND.—*Curran v. Curran*, 40

Ind. 484. MASS.—*Mulry v. Mohawk Valley Ins. Co.*, 71 Mass. (5 Gray) 541, 66 Am. Dec. 380. NEB. *Atchison & N. R. Co. v. Washburn*, 5 Neb. 123. NEV.—*Perkins v. Barnes*, 3 Nev. 557, 565. N. Y.—*McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696; *Button v. McCauley*, 38 Barb. 415; reversed on another point, 5 Abb. Pr. N. S. 29; *St. John v. Skinner*, 44 How. Pr. 198, 200.

⁷ *Mulry v. Mohawk Valley Ins. Co.*, 71 Mass. (5 Gray) 541, 66 Am. Dec. 380; *Haskins v. Hamilton Mut. Ins. Co.*, 71 Mass. (5 Gray)

The rule of procedural codes requiring a direct and plain statement of what the party intends to prove, applies to the plaintiff and the defendant alike,⁸ and hence the defendant, under the rule, is required to apprise the plaintiff of the defense on which he relies.⁹

§ 1171. — ANALOGY BETWEEN THE PRESENT AND THE FORMER SYSTEM. Under the former or common-law system of pleading, for instance, a former recovery could be given in evidence under a plea of the general issue, in assumpsit, trover, case, and in ejectment. Indeed, in ejectment, the only plea allowed was “not guilty.”¹ But the procedural codes have changed the rule upon this subject. While the procedural codes have abrogated the common-law system of pleading and abolished its technicalities and technical rules, yet in one respect the new system which has been introduced has a close analogy to that for which it has been substituted. The first defense permitted to the defendant under the procedural codes, as set out in the preceding section, which consists in a mere general denial, corresponds very closely with the plea of the general issue in actions of assumpsit and of debt on simple contract under the former or common-law system of pleading.² The decisions upon the subjects involved by the English courts, therefore, although not obligatory as precedents since the adoption of the procedural codes, will nevertheless be found to throw much light upon knotty subjects, and be assistful in many situations; because the general issue at common law, both in

438; *Goodwin v. Daniels*, 89 Mass. (7 Allen) 64.

⁸ *Ramsey v. Erie R. Co.*, 7 Abb. Pr. N. S. (N. Y.) 156, 180, 38 How. Pr. 193, 215.

⁹ *Babb v. Mackey*, 10 Wis. 377.

¹ See: *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692; *Young v. Rummell*, 2 Hill (N. Y.) 478, 38

Am. Dec. 594; *Miller v. Munice*, 6 Hill (N. Y.) 115; *Reynolds v. Stansberry*, 20 Ohio 344, 55 Am. Dec. 459.

² *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696; *Bank of Coopers-town v. Corlies*, 1 Abb. Pr. N. S. (N. Y.) 412, 418. See *Boston Relief & Submarine Co. v. Burnett*, 83 Mass. (1 Allen) 410.

assumpsit and in debt, was in theory what the general denial under the procedural codes is in fact,—simply a traverse of the material allegations of the plaintiff controverted by the defendant, although a different phraseology was adopted in the two common-law forms of action, and a very different result was produced.³

§ 1172. — EXCEPTIONS TO THE RULE. While the procedural codes and statutes require that all new affirmative matters constituting a defense must be set up in the answer, this rule does not apply to those defenses which merely go to negative the plaintiff's original cause of action, or to disprove what the plaintiff is required to prove in order to secure a recovery.¹ It is in those cases, only, in which the defendant relies for his defense upon some distinct substantive fact not alleged by the plaintiff, that is, not included in the averments in his complaint, and not within the issues raised by a simple denial,—that the defendant is required to set forth such fact in his answer.² Thus, a bailee sued for failure to pay over to the plaintiff money deposited with such bailee for the plaintiff, may introduce evidence to show that the money deposited with him was not the money of the depositor, but was the money of the depositor's employers, without that fact being specially pleaded in the answer.³ In an action on a note, under a denial of execution, the defendant may introduce evidence to show that the note was altered after execution.⁴ In an action in the nature of trespass to realty, where the only tendency of a deed relied on by the defendant is to disprove the allegation of plaintiff's seisin, it is admissible in evidence without

³ *McKyring v. Bull*, 16 N. Y. 697, 69 Am. Dec. 696.

¹ *Hawkins v. Borland*, 14 Cal. 413, 415; *Schaus v. Manhattan Gas Light Co.*, 36 N. Y. Super. Ct. Rep. (4 Jones & S.) 262, 263, 14 Abb. Pr. N. S. 371, 373, 45 How. Pr. 481,

482; *Hogen v. Klabo*, 13 N. D. 319, 324, 100 N. W. 847.

² *Jones v. Andover, Inhabitants of*, 94 Mass. (12 Allen) 21.

³ *McKay v. Draper*, 27 N. Y. 256, 266.

⁴ *Boomer v. Koon*, 6 Hun (N. Y.) 645, 647, 6 Thomp. & C. 645.

being specially set up in the answer.⁵ In an action on an annexed statement of account for services rendered, under a general denial, the defendant may introduce evidence of negligence and want of skill on the part of the plaintiff.⁶ Thus, it has been held that an attorney's negligence and unskilfulness in a matter in which he was employed, may be shown in evidence under a general denial, in an action to recover compensation for services in such matter.⁷

§ 1173. — **MATTERS WITHIN THE RULE AND REQUIRED TO BE SET UP.** Among the defenses constituting new affirmative matter, and required by the rule to be specially pleaded in the answer, aside from the special pleas treated in the preceding chapter, may be mentioned: Adverse possession;¹ agency and performance of act complained of under or in accordance with instructions or regulations of principal,—e. g., conductor sued in damages for assault upon passenger, under a general denial, can not prove the rules and regulations of the railroad company, that they are reasonable, and that he acted in accordance therewith.² A breach of an implied contract by plaintiff must be pleaded; e. g., in an action by a broker to recover commission or compensation for the sale of shares of stock, defense that he also acted as the agent of the purchaser must be specially pleaded.³ In an action in which a breach of a contract of marriage is charged, the plaintiff's lewd, immoral, or dissipated character or habits must be specially pleaded where relied upon as a bar to the action; but it is not necessary that they be pleaded in those cases where they are relied upon merely in mitigation of any damages the plaintiff may recover.⁴ A con-

⁵ Walker v. Swasey, 84 Mass. (2 Allen) 314.

⁶ Caverly v. McOwen, 123 Mass. 578.

⁷ Buttrick v. Gilman, 22 Wis. 859.

¹ American Co. v. Bradford, 27 Cal. 360, 367; Demick v. Chapman, 11 Johns. (N. Y.) 132.

Reason for the rule to prevent surprise.—Demick v. Chapman, 11 Johns. (N. Y.) 132.

² Pier v. Finch, 29 Barb. (N. Y.) 170, 171.

³ Duryee v. Lester, 75 N. Y. 442, 444.

⁴ Kniffin v. McConnell, 30 N. Y.

version of goods charged, a subsequent valid sale of the goods, on an execution in favor of the defendant and against the plaintiff, must be specially pleaded to enable evidence thereof to be admissible in evidence.⁵ A counter-claim⁶ or set-off must be specially pleaded, as must also the illegality of the contract sued on, although fair on its face.⁷ Malicious wrong being charged, mitigating circumstances may be set up in the answer,⁸ and must be where they come within the definition of “new matter,”—e. g., where a libel is charged, mitigating circumstances may be pleaded.⁹ The ratification of an infant’s contract on or after attaining majority must be specially pleaded before it can be shown in evidence.¹⁰ Recoupment of damages for breach by plaintiff of the contract sued on, must be specially pleaded.¹¹ Special contract limiting liability must be set up in the answer,—e. g., in an action against a telegraph company for failure to send a message;¹² or that plaintiff breached his contract to defendant’s injury,—e. g., in an action for goods sold.¹³ Title in an other must be set up, where relied on as a defense in an action charging the wrongful taking of goods or

285, 290; *Button v. McCauley*, 5 Abb. Pr. N. S. (N. Y.) 29, 1 Abb. Ct. App. Dec. 282, 4 Transc. App. 447.

⁵ *Maretzek v. Cauldwell*, 25 N. Y. Super. Ct. Rep. (2 Rob.) 715, 720, 19 Abb. Pr. 35, 40.

⁶ *Stoddard v. Treadwell*, 26 Cal. 294, 306.

As to counter-claim, see, post, §§ 1178-1187.

⁷ *Milbank v. Jones*, 127 N. Y. 370, 24 Am. St. Rep. 454, 28 N. E. 31, reversing 57 N. Y. Super. Ct. Rep. (25 Jones & S.) 135; *O’Toole v. Gavin*, 1 Hun (N. Y.) 92, 94, 3 Thomp. & C. 118; *Schreyer v. New York, City of*, 39 N. Y. Super. Ct. Rep. (7 Jones & S.) 1, 3.

⁸ *Foland v. Johnson*, 16 Abb. Pr. (N. Y.) 235; *Beckett v. Lawrence*, 7 Abb. Pr. N. S. (N. Y.) 403, 406.

⁹ *Bennett v. Matthews*, 64 Barb. (N. Y.) 410, 414.

¹⁰ *Fetrow v. Wiseman*, 40 Ind. 158.

¹¹ *Krom v. Levy*, 1 Hun (N. Y.) 171, 3 Thomp. & C. 704, 47 How. Pr. 97, appeal dismissed 60 N. Y. 126.

¹² *Baldwin v. United States Telegraph Co.*, 1 Lans. (N. Y.) 125, 135; judgment reversed on another point in 45 N. Y. 744.

¹³ *Manning v. Winter*, 7 Hun (N. Y.) 482, 485 (dissent of Gilbert, J.).

property.¹⁴ Usury is a personal privilege as a defense, which is waived by not being set up,¹⁵—and the like.

§ 1174. **NEW MATTER—DEFINITION OF.** What constitutes “new matter,” within the contemplation of the procedural codes? This question has been variously answered by the courts, but the decisions and discussions all lead to the same viewpoint or final conclusion. Thus, in an early California case, new matter is defined as affirmative matter which, under the rules of evidence, the defendant must establish.¹ If the onus probandi shifts from the plaintiff and is thrown upon the defendant,—in which case he will have the right to open and close the trial of the cause,—the matter to be proved by him is new matter. A defense which concedes that the plaintiff once had a good cause of action, but that, by reason of facts set forth, such cause of action no longer exists, involves new matter.² Otherwise defined, new matter, which must be set up in the answer to render a plea or defense maintainable, is affirmative matter not embraced within the issues raised, or which might be raised, by a simple denial or denials of the allegations in the complaint.³ That is to say, the term “new matter,” as used in procedural code pleading, has reference to matters or facts which can not be given in evidence under a simple denial of the complaint, but is required to be especially pleaded as a defense;⁴ in other words, means “outside the issues

¹⁴ *Kissam v. Roberts*, 19 N. Y. Super. Ct. Rep. (6 Bosw.) 165.

¹⁵ *Scott v. Johnson*, 18 N. Y. Super. Ct. Rep. (5 Bosw.) 213, 224; *Williams v. Birch*, 19 N. Y. Super. Ct. Rep. (6 Bosw.) 299, 307; affirmed in *Williams v. Tilt*, 36 N. Y. 319.

¹ *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692.

² *Coles v. Soulsby*, 21 Cal. 50; *Landis v. Morrissey*, 69 Cal. 83, 86, 10 Pac. 258; *Id.*; *Brazil v. Isham*,

12 N. Y. 17; *Gilbert v. Cram*, 12 How. Pr. (N. Y.) 455; *Radde v. Ruckgaher*, 10 N. Y. Super. Ct. Rep. (3 Duer) 685.

³ *Milbank v. Jones*, 127 N. Y. 370, 376, 24 Am. St. Rep. 454, 28 N. E. 31, reversing 57 N. Y. Super. Ct. Rep. (25 Jones & S.) 135; *Weil v. Unique Electric Device Co.*, 39 Misc. (N. Y.) 527, 80 N. Y. Supp. 484.

⁴ *Id.*; *Staten Island Midland R. Co. v. Hinchcliffe*, 34 Misc. (N. Y.)

raised by a denial.'"⁵ From which it follows that no matter is new which is provable under the issues raised by a simple denial or denials of the allegations in the plaintiff's complaint.⁶ Thus, where the defendant denies the contract as the plaintiff has stated it, that is not new matter;⁷ e. g., by showing that there were other terms of the contract than those set forth by the plaintiff.⁸ To sum up the consensus of judicial opinion, "new matter" is a fact which the plaintiff is not bound to prove in the first instance to entitle him to a recovery, but which goes to the avoidance of the defendant's liability or the discharge of the cause of action set out in the plaintiff's complaint;⁹ is matter constituting a defense by way of confession and avoidance;¹⁰ whatever is, in effect, in the nature of a bar to the plaintiff's right of recovery on the cause of action set out, whether the defense goes to the plaintiff's entire cause of action or only to a part of it;¹¹ a counter-claim,¹² a set-off,¹³ or any fact extrinsic to the

49, 9 N. Y. Ann. Cas. 407, 68 N. Y. Supp. 556; *Pascekwitz v. Richards*, 37 Misc. (N. Y.) 250, 75 N. Y. Supp. 291.

⁵ *Ferguson v. Rutherford*, 7 Nev. 385; *Staten Island Midland R. Co. v. Hinchcliffe*, 34 Misc. (N. Y.) 624, 70 N. Y. Supp. 601; affirmed, 66 App. Div. 614, 73 N. Y. Supp. 1148; modified on another point, 170 N. Y. 473, 63 N. E. 545; *Burkert v. Bennett*, 35 Misc. (N. Y.) 318, 71 N. Y. Supp. 144.

⁶ *Id.*

⁷ *Parks v. Hinds*, 14 Cal. 413, 415.

⁸ *Ferguson v. Rutherford*, 7 Nev. 385, 390.

⁹ *Bell v. Yates*, 33 Barb. (N. Y.) 627, 629.

¹⁰ *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696; *Bellinger v. Craigue*, 31 Barb. (N. Y.) 534, 537; *Wehle v. Haviland*, 4 Daly (N. Y.)

550, 42 How. Pr. 399, 407; *Roe v. Angevine*, 7 Hun (N. Y.) 679; *Taylor v. Richards*, 22 N. Y. Super. Ct. Rep. (9 Bosw.) 679.

As to pleas in confession and avoidance, see, ante, § 1095.

¹¹ *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696; *Foland v. Johnson*, 16 Abb. Pr. (N. Y.) 235, 239; *Cummings v. Morris*, 16 N. Y. Super. Ct. Rep. (3 Bosw.) 573; *Loosey v. Orser*, 17 N. Y. Super. Ct. Rep. (4 Bosw.) 391, 403; *Maretzek v. Cauldwell*, 25 N. Y. Super. Ct. Rep. (2 Rob.) 715, 720, 19 Abb. Pr. 35, 40; *Wehle v. Butler*, 35 N. Y. Super. Ct. Rep. (3 Jones & S.) 1, 12, 12 Abb. Pr. N. S. 139, 149, 43 How. Pr. 5, 16.

¹² As to counter-claims and cross-demands, see, post, §§ 1178-1187.

¹³ As to equitable defenses and set-offs, see, post, § 1191.

matter alleged in the complaint as constituting the cause of action, including all affirmative defenses, whether legal or equitable, not included in a simple denial of the allegations in the complaint.¹⁴

§ 1175. — WHAT CONSTITUTES—IN GENERAL. New matter is where defendant seeks to introduce into the case a defense not disclosed by the pleadings; something relied upon by him, but not put in issue by the plaintiff, and is such as defendant must affirmatively establish.¹ Such matter must be specially pleaded.² The code makes no difference in the classes of new matter, for whatever admits, either directly or by way of necessary implication, that a cause of action as stated in the complaint once existed, but at the same time avoids it and shows that it has ceased to exist, is new matter.³ But if the facts averred in the answer only show that some essential allegation of the complaint is untrue, then they are not new matter, but only a traverse.⁴ The answer must allege those facts, which, when the case of the plaintiff is admitted or proved, the defendant must prove in order to defeat a recovery.⁵ Such allegations must be affirmatively established; therefore, if the onus of proof is

¹⁴ *Cody v. South Omaha Nat. Bank*, 46 Neb. 756, 65 N. W. 906.

¹ *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692; *Bridges v. Paige*, 13 Cal. 640.

² *Coles v. Soulsby*, 21 Cal. 47; *Morrill v. Irving Ins. Co.*, 33 N. Y. 429 88 Am. Dec. 396.

³ *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692; *Glazer v. Clift*, 10 Cal. 303; *Brazil v. Isham*, 12 N. Y. 17; *Walrod v. Bennett*, 6 Barb. (N. Y.) 144; *Bellinger v. Craigie*, 31 Barb. (N. Y.) 534, 537; *Carter v. Koezley*, 22 N. Y. Super. Ct. Rep. (9 Bosw.) 583, 14 Abb. Pr. 147.

⁴ *Goddard v. Fulton*, 21 Cal. 430.

⁵ *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692; *Glazier v. Clift*, 10 Cal. 303; *Horton v. Ruhling*, 3 Nev. 498; *Rapalee v. Stewart*, 27 N. Y. 310; *Fry v. Bennett*, 28 N. Y. 324; *Pier v. Finch*, 29 Barb. (N. Y.) 170; *Ayrault v. Chamberlin*, 33 Barb. (N. Y.) 229, 237; *Beaty v. Swarthout*, 32 Barb. (N. Y.) 293; *Jacobs v. Rensen*, 35 Barb. (N. Y.) 384, 12 Abb. Pr. 390; *Simmons v. Law*, 21 N. Y. Super. Ct. Rep. (8 Bosw.) 213; affirmed, *42 N. Y. (3 Keyes) 217; *Dingeldein v. Third Ave. R. Co.*, 22 N. Y. Super. Ct. Rep. (9 Bosw.) 79; judgment reversed on another point, 37 N. Y. 575, 5 Transc. App. 155.

thrown upon the defendant, it is new matter.⁶ For under the statute of California, the affirmative allegations of an answer stand controverted by the plaintiff, and the burden is on defendant to prove the truth of such allegations.⁷ To admit evidence of such new matter, therefore, it must be specially pleaded.⁸

Affirmative allegations in the answer, in effect only denials, are not new matter.⁹ For new matter confesses and avoids expressly or impliedly the cause of action set up in the complaint.¹⁰ An answer or a count seeking to avoid the cause of action stated in the complaint, by new matter, should confess, directly or by implication, that but for the new matter, justification, or avoidance, the action could be maintained.¹¹ It is essential to the sufficiency of an answer stating new matter as a defense that it state facts, which, if true, will bar the action, or so much of it as is attempted to be answered.¹² A special plea containing new matter, but with no appropriate conclusion, is

⁶ Thompson v. Lee, 8 Cal. 275; Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692.

⁷ Kerr's Cyc. Cal. Code Civ. Proc., § 462. See Bryan v. Maume, 28 Cal. 238.

⁸ Walton v. Minturn, 1 Cal. 362; Piercy v. Sabin, 10 Cal. 22, 30, 70 Am. Dec. 692; Field v. New York, City of, 6 N. Y. 179, 57 Am. Dec. 435; McKyring v. Bull, 16 N. Y. 297, 69 Am. Dec. 696; Wright v. Delafield, 25 N. Y. 266; New York Central Ins. Co. v. National Protection Ins. Co., 20 Barb. (N. Y.) 468; judgment reversed on another point, 14 N. Y. 85; Bucknam v. Brett, 35 Barb. (N. Y.) 596, 13 Abb. Pr. 119, 22 How. Pr. 233; Sandford v. Travers, 20 N. Y. Super. Ct. Rep. (7 Bosw.) 498, judgment

modified on another point 40 N. Y. 140.

⁹ Goddard v. Fulton, 21 Cal. 430.

¹⁰ Sylvis v. Sylvis, 11 Colo. 319, 17 Pac. 912; Gregory v. Trainor, 4 E. D. Smith (N. Y.) 58, 1 Abb. Pr. 209; Lewis v. Kendall, 1 N. Y. Code Rep. (N. S.) 402, 6 How. Pr. 59; Anibal v. Hunter, 1 N. Y. Code Rep. (N. S.) 403, 6 How. Pr. 255; Sayles v. Wooden, 1 N. Y. Code Rep. (N. S.) 409, 6 How. Pr. 84; Arthur v. Brooks, 14 Barb. (N. Y.) 533; Simonton v. Winter, 30 U. S. (5 Pet.) 140, 8 L. Ed. 75, reversing 3 Cr. C. C. 104, Fed. Cas. No. 17894; Greathouse v. Dunlap, 3 McL. 303, Fed. Cas. No. 5742.

¹¹ Anson v. Dwight, 18 Iowa 241.

¹² Carter v. Koezley, 22 N. Y. Super. Ct. Rep. (9 Bosw.) 583, 14 Abb. Pr. 147.

bad upon special demurrer.¹³ New matter occurring after issue joined must be set up by supplemental answer.¹⁴ A levy by a sheriff set forth in the answer as a defense is new matter.¹⁵

§ 1176. ——— MATTER NOT IN DISCHARGE OR AVOIDANCE. In all those cases in which the affirmative allegations in the answer are not in discharge or avoidance of a cause of action theretofore existing, but the purpose of which is to show that the alleged cause of action never did exist, and that material allegations of the complaint are not true, is not new matter such as is required to be specially pleaded.¹ That is not new matter in an answer which might have been shown under the general denial.² But whatever averments of the answer amount to an admission of the allegations of the complaint, and tend to establish some fact not inconsistent with such allegations, constituting a defense or counter-claim, and which could not have been proved under a specific denial are new matter requiring a replication under Montana practice.³ Where the illegality of the contract sued upon does not appear in the plaintiff's pleadings or proof, a defense based on that ground is new matter and must be affirmatively alleged in the answer.⁴ In a suit for specific performance, the defendant has a right to plead in his answer, as new matter, a contract different from the one alleged in the complaint, and the court will then ascertain

¹³ *Leslie v. Harlow*, 18 N. H. 518.

¹⁴ *Jessup v. King*, 4 Cal. 331.

¹⁵ *Mulford v. Estudillo*, 23 Cal. 94.

¹ *Churchill v. Bauman*, 95 Cal. 541, 30 Pac. 770; *Hudson v. Wabash Western R. Co.*, 101 Mo. 13, 14 S. W. 15; *Manning v. Winter*, 7 Hun (N. Y.) 482; *Lupo v. True*, 16 S. C. 586.

² *Leggatt v. Stewart*, 5 Mont. 107, 2 Pac. 320.

³ *Mauldin v. Ball*, 5 Mont. 96, 1 Pac. 409. See, also: *Sylvia v. Sylvia*, 11 Colo. 319, 17 Pac. 912; *Hallack-Sayer-Newton Lumber Co. v. Blake*, 4 Colo. App. 486, 36 Pac. 554.

⁴ *Buchtel v. Evans*, 21 Ore. 309, 28 Pac. 67.

from the evidence which was the real agreement.⁵ In an action for goods sold and delivered, the complaint alleged a promise to pay for the goods on demand, and the answer merely denied the allegations of the complaint. On the trial, the court excluded evidence offered by the defendant showing that the goods were sold on a credit of sixty days, which period had not expired when the action was commenced. It was held that the evidence was not new matter, and was admissible in defense of the action without being specially pleaded.⁶ By failing to reply to new matter in an answer, every material fact that is well pleaded therein stands admitted, but legal conclusions need not be denied.⁷ Where the defendant pleads new matter in the answer as a defense, praying to be discharged, he is not concluded thereby from obtaining such relief as he shows himself entitled to.⁸

§ 1177. PRAYER AND VERIFICATION TO ANSWER. We have already sufficiently discussed the question of verification of pleadings, including the necessity for and verification of the answer.¹ A formal prayer to an answer is not required, when no counter-claim is set up.² In an action to recover personal property, or to obtain the value of the property on judgment of dismissal against the plaintiff for failure to appear, the answer must contain some allegation or prayer relative to the change of possession from defendant to plaintiff.³

§ 1178. COUNTER-CLAIM—DEFINITION AND DISTINCTION. The word “counter-claim” is a recent addition to the terminology of remedial judicature, introduced by the

⁵ *Thompson v. Hawley*, 14 Ore. 199, 12 Pac. 276.

⁶ *Landis v. Morrissey*, 69 Cal. 83, 10 Pac. 258.

⁷ *Larson v. Oregon R. & Nav. Co.*, 19 Ore. 240, 23 Pac. 974.

⁸ *Davis v. Davis*, 9 Mont. 267, 23 Pac. 715.

¹ See, ante, §§ 777-801.

² *Bendit v. Annesley*, 42 Barb. (N. Y.) 192, 27 How. Pr. 184.

³ *Gould v. Scannell*, 13 Cal. 430; *Pico v. Pico*, 56 Cal. 453, 459; *Banning v. Marleau*, 101 Cal. 238, 239, 35 Pac. 772.

procedural codes and statutes adopted in many, if not most, of the jurisdictions in this country, and comprehends a liberal practice in the administration of justice theretofore unknown to the law. The term comprehends and includes, in some jurisdictions at least, the principles both of recoupments and sets-off, as theretofore known to and administered by the common law, but is much broader than either, and is in the nature of a cross-action on the part of the defendant against the plaintiff on matters arising or growing out of or connected with the subject-matter of the action;¹ a demand which of right belongs to the defendant, in opposition to the right of the plaintiff in the action,² and upon which an original action might be brought in his favor.³ A counter-claim must contain all the elements of an accrued cause of action; must be measured and judged by the same rules which apply to the complaint in the action; must be a present claim upon which the defendant is entitled to a present judgment;⁴ is, in effect, an action in favor of the defendant against the plaintiff in the original suit,⁵ and is allowed in order that the whole controversy between the parties

¹ ARK.—White v. Regan, 32 Ark. 281, 289; Hudson v. Snipes, 40 Ark. 75, 78. IND.—Connor v. Wenton, 7 Ind. 523; Standley v. Northwestern Mut. Life Ins. Co., 95 Ind. 254, 261; Keifer v. Summers, 137 Ind. 106, 25 N. E. 1103; Blue v. Capital Nat. Bank, 145 Ind. 518, 43 N. E. 655. KY.—Slone v. Slone, 59 Ky. (2 Metc.) 339; Renaker v. Smith, 109 Ky. 643, 60 S. W. 407. MONT.—Davis v. Frederick, 6 Mont. 300, 12 Pac. 664. N. Y.—Carpenter v. Manhattan Life Ins. Co., 93 N. Y. 552, 556-7; Romaine v. Brewster, 10 Misc. 120, 24 N. Y. Civ. Proc. Rep. 121, 30 N. Y. Supp. 948 reversing 6 Misc. 531, 27 N. Y. Supp. 138; Cohn v. Husson, 66

How. Pr. 150. S. D.—Minneapolis Threshing Machine Co. v. Darnall, 13 S. D. 279, 83 N. W. 266.

² Venable v. Dutch, 37 Kan. 515, 1 Am. St. Rep. 260, 15 Pac. 520; Sillman v. Eddy, 8 How. Pr. (N. Y.) 122, 123.

³ Belleau v. Thompson, 33 Cal. 495, 497; Bardes v. Hutchinson, 113 Iowa 610, 85 N. W. 797.

⁴ Slone v. Slone, 59 Ky. (2 Metc.) 339; Union Bank v. Hayward, 15 S. C. 296, 303.

⁵ Davidson v. Remington, 12 How. Pr. (N. Y.) 310; Albany Brass & Iron Co. v. Hoffman, 12 Misc. (N. Y.) 167, 33 N. Y. Supp. 600; affirmed, 33 N. Y. Supp. 1125.

may be determined and disposed of in one adjudication,⁶ and that the claim of one may be offset against, or applied upon, the claim of the other,⁷ thus preventing further or future litigation between the parties on account thereof.

Counter-claim does not connote the same thing in all the jurisdictions which have adopted the reformed procedure. In some of the jurisdictions it embraces recoupments and sets-off, while in others it is limited to those cross-claims or cross-demands upon which the defendant is entitled to a present affirmative award.⁸ While in the nature of a cross-action or cross-complaint⁹ in the same suit, it is to be distinguished from a cross-action, in broad terms, in this: In a counter-claim the defendant's cause of action is against the plaintiff in the suit, whereas in a cross-complaint the defendant's cause of action is against a codefendant or codefendants, or against one or more codefendants and a third person, or possibly against a single person not a party to the original action.¹⁰

§ 1179. — NATURE OF AND ESSENTIAL CONDITIONS. In order to constitute a counter-claim within the meaning of the procedural codes, the claim must tend, in some manner, to defeat or to diminish the plaintiff's claim and right of recovery, and must be based on a cause of action against the plaintiff, or, in a proper case, the person whom he represents or from whom he took an assignment of the claim sued on,¹ and in favor of the defendant, or in favor

⁶ *Slone v. Slone*, 59 Ky. (2 Metc.) 339.

⁷ *Carpenter v. Manhattan Life Ins. Co.*, 93 N. Y. 552, 556-7; *Romanie v. Brewster*, 6 Misc. (N. Y.) 531, 27 N. Y. Supp. 138; reversed on the point that, in an action for rent, a counter-claim for damages for a constructive eviction because of untenable condition of the premises, without alleging a covenant for quiet enjoyment, does not state a cause of action arising out

of or connected with the same cause of action, in 10 Misc. (N. Y.) 120, 24 N. Y. Civ. Proc. Rep. 121, 30 N. Y. Supp. 138; *Minneapolis Threshing Machine Co. v. Darnall*, 13 S. D. 279, 83 N. W. 266.

⁸ *Union Bank v. Hayward*, 15 S. E. 296, 303.

⁹ As to cross-complaint, see, post, §§ 1192-1198.

¹⁰ *White v. Regan*, 32 Ark. 281, 290.

¹ In California counter-claim is

of one or more codefendants, between whom and the plaintiff a present judgment might be had in an original action, and must be based on (1) a cause of action arising out of the transaction set forth in the complaint as the foundation for the plaintiff's claim, or be connected with the subject-matter of the action;² or (2) a cause of action arising upon contract, or any other cause of action arising upon contract and existing at the commencement of the action.³ This provision seems to have been designed to take the place of recoupments⁴ and sets-off,⁵ as theretofore known to remedial judicature, although, as already noted, it is much broader than either.⁶ Neither recoupment nor set-off, under those names, is provided for by the California procedural code. The case of recoupments falls within the first class of counter-claims allowed, as above indicated, and the second class of counter-claims allowed includes sets-off, as that remedy formerly existed, but does not restrict the set-off to cases where the damages sought to be set off are liquidated.⁷

*A counter-claim is a cause of action in which a several judgment might be obtained against the plaintiff, in favor of the defendant, in an action arising out of the transaction set forth in the complaint and answer, or connected with the subject of the action.*⁸ In an action arising upon

not barred by death or the assignment of a claim in those cases in which cross-demands exist between the parties.—See Kerr's Cyc. Cal. Code Civ. Proc., § 440.

² Kerr's Cyc. Cal. Code Civ. Proc., § 438, subd. 1.

³ Id.; subd. 2. See, also, discussion and authorities in Bliss on Code Pleading, §§ 367, 390; Pomeroy's Code Remedies and Remedial Rights, §§ 726, 868.

⁴ See, post, § 1188.

⁵ See, post, §§ 1189-1191.

⁶ See, ante, § 1178.

⁷ Wheelock v. Pacific Pneumatic Gas Co., 51 Cal. 223, 226.

General subject of counter-claim by means of set-off is discussed in Xenia Branch State Bank of Ohio v. Lee, 15 N. Y. Super. Ct. Rep. (2 Bosw.) 694, 7 Abb. Pr. 372.

⁸ ARK.—Hudson v. Snipes, 40 Ark. 75.; CAL.—Story & Isham Commercial Co. v. Story, 100 Cal. 30, 34 Pac. 671. N. Y.—Drake v. Cockroft, 4 E. D. Smith 34, 1 Abb. Pr. 203, 10 How. Pr. 377; Askins v. Hearn, 3 Abb. Pr. 184; Gottler

contract, it is any other cause of action arising also upon contract, and existing at the commencement of the action.⁹ Or, in other words, a cause of action in favor of the defendant upon which he might have sued the plaintiff and obtained affirmative relief in a separate action.¹⁰

When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counter-claim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither be deprived of the benefit thereof by the assignment or death of the other.¹¹

A debtor has a right to purchase cross-demands against a partnership, and set them up as a defense against a debt due by him to the partnership.¹²

*The counter-claim provided for in the California procedural code, and other procedural codes and statutes with like provisions, is one existing in favor of the defendant, and against the plaintiff;*¹³ and it must be exist-

v. Babcock, 7 Abb. Pr. 392, note; Barhyte v. Hughes, 33 Barb. 320; New York, City of, v. Parker Vein Steamship Co., 21 N. Y. Super. Ct. Rep. (8 Bosw.) 300, 12 Abb. Pr. 300, 21 How. Pr. 289. UTAH—Markes v. Tompkins, 7 Utah 421, 27 Pac. 6.

See, also, ante, § 1178, and authorities.

⁹ Kerr's Cyc. Cal. Code Civ. Proc., § 438. See, also: Schuster v. Thompson, 6 Dak. 10, 50 N. W. 125; McGuire v. Edsall, 14 Mont. 359, 36 Pac. 453.

¹⁰ Howard v. Shores, 10 Cal. 277; Belleau v. Thompson, 33 Cal. 495.

See, also, discussion, ante, § 1178, and authorities.

Counter-claim fully discussed in Xenia Branch of State Bank of Ohio v. Lee, 15 N. Y. Super. Ct. Rep. (2 Bosw.) 694, 7 Abb. Pr. 372.

See, also: Andre v. Morrow, 65 Miss. 315, 7 Am. St. Rep. 658, 3 So. 659; Cragin v. Lovell, 88 N. Y. 258, 2 N. Y. Civ. Proc. Rep. (Browne) 128; Pattison v. Richards, 22 Barb. (N. Y.) 143; Kneeder v. Sternberg, 10 How. Pr. (N. Y.) 67; Wolf v. H—, 13 How. Pr. (N. Y.) 84; Lemon v. Trull, 13 How. Pr. (N. Y.) 248; affirmed, 16 How. Pr. 576, note; Welch v. Hazelton, 14 How. Pr. (N. Y.) 97; Vasseur v. Livingston, 11 N. Y. Super. Ct. Rep. (4 Duer) 285; affirmed, 13 N. Y. 248; Schweickhart v. Stuewe, 71 Wis. 1, 5 Am. St. Rep. 190, 36 N. W. 605.

¹¹ Kerr's Cyc. Cal. Code Civ. Proc., § 440.

¹² Naglee v. Minturn, 8 Cal. 540; Marye v. Jones, 9 Cal. 335.

¹³ King v. Wise, 43 Cal. 628; Merrick v. Gordon, 20 N. Y. 93; Ogden v. Coddington, 2 E. D.

ing at the commencement of the action,¹⁴ and at the time belong to the defendant.¹⁵ To authorize a set-off at law,¹⁶ the debts must be between the parties in their own rights, and must be of the same kind and quality, and be clearly ascertained or liquidated; they must be certain and determined debts.¹⁷ The demand of a counter-claim must operate in whole or in part to defeat the plaintiff's right of recovery in the action.¹⁸ The defendant may not only defeat the plaintiff's claim by pleading a set-off, but may recover a balance in excess of that claim.¹⁹ But a mortgagor can not defend against or redeem from his mortgage by setting up an independent personal claim against the mortgagee.²⁰

Smith (N. Y.) 317; Weeks v. Pryor, 27 Barb. (N. Y.) 79; Duncan v. Stanton, 30 Barb. (N. Y.) 533; Tyler v. Willis, 33 Barb. (N. Y.) 327, 12 Abb. Pr. 465; Chaffee v. Cox, 1 Hilt. (N. Y.) 78; Davidson v. Remington, 12 How. Pr. (N. Y.) 310; Auburn City Bank v. Leonard, 20 How. Pr. (N. Y.) 193; Gleason v. Moen, 9 N. Y. Super. Ct. Rep. (2 Duer) 639; Gillespie v. Torrance, 17 N. Y. Super. Ct. Rep. (4 Bosw.) 36, 7 Abb. Pr. 462; affirmed, 25 N. Y. 306; Boyd v. Foot, 18 N. Y. Super. Ct. Rep. (5 Bosw.) 110.

¹⁴ Gannon v. Dougherty, 41 Cal. 661; Wood v. Brush, 72 Cal. 224, 227, 13 Pac. 627; Rice v. O'Connor, 10 Abb. Pr. (N. Y.) 362; McGuire v. Edsall, 14 Mont. 359, 36 Pac. 453.

See, ante, § 1178, and cases.

¹⁵ Chambers v. Lewis, 11 Abb. Pr. (N. Y.) 210; affirmed, 28 N. Y. 545, affirming 2 Hilt. 591, 10 Abb. Pr. 206; Van Valen v. Lapham, 12

N. Y. Super. Ct. Rep. (5 Duer) 689, 13 How. Pr. 240.

¹⁶ As to sets-off, see, post, §§ 1189-1191.

¹⁷ Naglee v. Palmer, 7 Cal. 543; Hobbs v. Duff, 23 Cal. 627; King v. Wise, 43 Cal. 628.

Unliquidated demand triable before a jury, and bearing no relation to the subject of the suit, can not be used as a set-off to a suit in equity.—Burrage v. Bonanza Gold & Quartz Min. Co., 12 Ore. 169, 6 Pac. 766.

¹⁸ National Fire Ins. Co. v. McKay, 21 N. Y. 191; Mattoon v. Baker, 24 How. Pr. (N. Y.) 329.

¹⁹ Ogden v. Coddington, 2 E. D. Smith (N. Y.) 317.

²⁰ Brown v. Coriell, 50 N. J. Eq. 753, 35 Am. St. Rep. 789, 21 L. R. A. 321, 26 Atl. 619. See McMichael v. Webster, 57 N. J. Eq. 302, 73 Am. St. Rep. 630, 41 Atl. 714.

As to counter-claim or set-off in mortgage foreclosure, see note 21 L. R. A. 321.

§ 1180. ————"TRANSACTION" DEFINED. The term "transaction," as used in the first ground on which a counter-claim is allowed under the procedural codes, as all ready set forth,¹ has been defined by the California Supreme Court as a matter or affair either completed or in the course of completion, and as being more or less complex, consisting of various facts and acts done by the parties, saying that there may and generally must be acts, facts, events and defaults in the transactions as a whole which do not enter into each cause of action in favor of the plaintiff or defendant, but are confined to one of them alone.² The transaction must be some business affair between parties whereby mutual and reciprocal obligations are created.³ The entire transaction between the parties and the rights resulting therefrom are to be determined by the court upon the proof relative to the transaction, and consistently with the case as presented by both parties.⁴ In many of the jurisdictions it is sufficient if the counter-claim arises out of a matter that is connected with the subject of the action.⁵

In Oregon, the statute is not so broad, and a counter-claim is allowed only when the subject thereof arises out of and is legally connected with the contract or transaction which is the subject of the original complaint.⁶ The statute relating to counter-claim ought, however, to be liberally construed, to the end that all controversies coming fairly within the terms of the statute may be settled in a single action between the parties.⁷

¹ See, ante, § 1179, footnote 2.

² *Story & Isham Commercial Co. v. Story*, 100 Cal. 30, 34-5, 34 Pac. 671, following and adopting the definition in *Pomeroy on Code Remedies and Remedial Rights*, § 774.

³ *Loewenberg v. Rosenthal*, 18 Ore. 178, 22 Pac. 601.

⁴ Code Pl. and Pr.—99

⁴ *Story & Isham Commercial Co. v. Story*, 100 Cal. 30, 34 Pac. 671.

⁵ See *Carpenter v. Manhattan Life Ins. Co.*, 93 N. Y. 552, affirming 22 Hun 49.

⁶ *Wait v. Wheeler & Wilson Mfg. Co.*, 23 Ore. 298, 31 Pac. 661.

⁷ Id.

§ 1181. — **ARISING OUT OF CONTRACT.** If plaintiff's cause of action is for damages for breach on the part of the defendant, defendant may interpose a counter-claim for damages for a breach of the same contract by plaintiffs.¹ Damages which do not legally result from the breach of the contract can not be recovered unless they are specially claimed and set forth in the pleading.² Thus, damages sustained by vendee of goods by reason of his inability to comply with a contract made by him with a third person, do not legally result from a breach of the contract of his vendor to deliver the goods to him; and in an action by his vendor against him, can not be recouped from the plaintiff's claim, unless such damages are specially alleged and set forth in the answer.³ Matters *ex contractu*, arising out of a different matter from the one in suit, may be proved by way of set-off.⁴ So held, as to damages, arising from the plaintiff's breach of a sealed contract, entirely disconnected with the note in suit, viz., a covenant that logs floated down a certain stream by the plaintiff should not injure the defendant's land.⁵ Also so held in an action to recover certain mining claims, alleged to have been located for plaintiff under contract, in which it was held that the defendant could file a counter-claim for an interest in other mines, which he alleges himself entitled to under his version of the contract under which the mining claims sued for were located.⁶ Counter-claims by way of recoupment may be set off against the claim of plaintiff, in an action arising out of a contract.⁷ In such a case damages may be pleaded

¹ *Dennis v. Belt*, 30 Cal. 247.

² See, post, § 1183.

³ *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288.

⁴ See, post, § 1182.

⁵ *Halfpenny v. Bell*, 82 Pa. St. 128.

⁶ *Bannerot v. McClure*, 39 Colo. 472, 12 L. R. A. (N. S.) 126, 90 Pac. 70.

Interest in other mines arising under another contract, defendant could not be permitted to file a counter-claim for such interest for the reasons given in the next section.

⁷ *Stoddard v. Treadwell*, 26 Cal. 300; *Vassear v. Livingston*, 13 N. Y. 248; *Spencer v. Babcock*, 22 Barb. (N. Y.) 326; *Gleason v.*

as a set-off, and evidence adduced to prove the damages embraced in the counter-claim of defendant.⁸ But they must be specially claimed,⁹ or they will not be allowed.¹⁰

Unliquidated damages may be the subject of off-set, if arising upon contract.¹¹ Under the Washington code,¹² an unliquidated claim for damages may be a subject of counter-claim, provided it arises out of the contract or transaction upon which the plaintiff bases his complaint.¹³

§ 1182. — BASED ON CONTRACT IN INDEPENDENT TRANSACTION. In those cases in which the counter-claim is filed under the second ground upon which counter-claims are allowed, as above set forth,¹ such counter-claim must be such as, in some way, tends to diminish or defeat the plaintiff's claim in the subject-matter of the action;² and if it does not do this, the defendant's claim under such independent contract can not be interposed as a counter-claim.³ Thus, in a case in which an action was brought to recover certain mining claims, alleged to have been located by the defendant for the plaintiff under a contract for that service, the defendant can not interpose a counter-claim under another contract, under which latter contract the defendant conveyed to the plaintiff an in-

Moen, 9 N. Y. Super. Ct. Rep. (2 Duer) 639; *Xenia Branch State Bank of Ohio v. Lee*, 15 N. Y. Super. Ct. Rep. (2 Bosw.) 694, 7 Abb. Pr. 372.

⁸ *Stoddard v. Treadwell*, 26 Cal. 300.

⁹ *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288; *Hinks v. Green*, 9 Cal. 74; *Stoddard v. Treadwell*, 26 Cal. 306; *Cleary v. Folger*, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280.

¹⁰ *Byxble v. Wood*, 24 N. Y. 607.

¹¹ *Wheelock v. Pacific Pneu-*

matic Gas Co., 51 Cal. 226; *Schurbeart v. Harteau*, 34 Barb. (N. Y.) 447; *Gage v. Angell*, 8 How. Pr. (N. Y.) 335; *New York, City of, Mable*, 13 N. Y. 151, 64 Am. Dec. 538, reversing 9 N. Y. Super. Ct. Rep. (2 Duer) 401.

¹² § 195.

¹³ *Niver v. Nash*, 7 Wash. 558, 35 Pac. 380.

¹ See, ante, § 1179, footnote 3.

² *Bannert v. McClure*, 39 Colo. 472, 12 L. R. A. (N. S.) 126, 90 Pac. 70.

³ Id. See, also, authorities cited in note 12 L. R. A. (N. S.) 126.

terest in certain other mining claims upon the plaintiff's undertaking to patent the claims and to organize a corporation to take over the title to the mining claims when thus patented, which latter agreement the plaintiff failed and refused to carry out.⁴ We have already seen that a mortgagor, in a suit to foreclose the mortgage, can not set up an independent personal claim against the mortgagee, arising out of a separate and independent contract, express or implied;⁵ e. g., a claim for use and occupation against a mortgagee in possession after conveyance to mortgagor.⁶

§ 1183. — **MUST BE SPECIALLY PLEADED—ESSENTIAL ALLEGATIONS.** All counter-claims, to be available, must be specially pleaded.¹ Under the plea of general issue, evidence of a counter-claim is not admissible; it should be specially pleaded.² It is not enough to allege in general terms that the demand is a counter-claim. It must be stated specifically.³ To entitle a defendant to set off a claim against a demand of the plaintiff, he must set forth in his answer the nature of the claim which he intends to set off; and when this was not done, it was held that the court below properly rejected evidence of the claim proposed to be set off.⁴ The pleading must show the existence of the counter-claim at the commencement of the action, and if it does not it is demurrable.⁵ It is error for the court to permit the defendant by amendment to

⁴ Id.

⁵ See, ante, § 1179, footnote 20.

⁶ See *McMichael v. Webster*, 57 N. J. Eq. 302, 73 Am. St. Rep. 630, 41 Atl. 714.

¹ See, ante, § 1173.

² *Hicks v. Green*, 9 Cal. 74, 75; *Reese v. Gordon*, 19 Cal. 147, 150; *Quinn v. Smith*, 49 Cal. 163, 165; *Deneale v. Young*, 2 Cr. C. C. 418, Fed. Cas. No. 3786.

All substantive averments nec-

essary in a complaint, should be contained in the plea of a counter-claim.—*Quinn v. Smith*, 49 Cal. 163, 165; *Clay v. Carroll*, 67 Cal. 19, 21, 6 Pac. 874.

See, ante, § 178; also note 89 Am. Dec. 482-492.

³ *Van Valen v. Lapham*, 12 N. Y. Super. Ct. Rep. (5 Duer) 689.

⁴ *Bernard v. Mullo*t, 1 Cal. 368.

⁵ *Gannon v. Dougherty*, 41 Cal. 661; *Wood v. Brush*, 72 Cal. 224, 13 Pac. 627.

plead a counter-claim maturing after the action is commenced.⁶ It is enough if the answer states a cause of action against the plaintiff, arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action.⁷ Though certain defenses, by way of set-off, are pleaded in the answer in a very informal and inartificial manner, still, if the facts showing that they constitute valid claims against the plaintiff are sufficiently stated, the defenses ought not to be stricken out.⁸ The facts as to how it arose out of the transaction must be stated in the answer.⁹ A plea of set-off for money had and received does not permit a recovery of damages for breach of an express contract.¹⁰ The nature of the claim must be set forth,¹¹ and if sufficiently pleaded, it should not be stricken out.¹² It must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant;¹³ and must be separately stated.¹⁴ Facts must be stated which constitute a cause of action against the plaintiff, and its sufficiency must be governed by the same rules as if the defendant had brought suit against the plaintiff.¹⁵ A counter-claim which fails to allege that the debt existed at the commencement of the action, but alleged that it is now due, is bad, and a demurrer thereto is properly sustained.¹⁶ Although the

⁶ *McGuire v. Edsall*, 14 Mont. 359, 36 Pac. 453.

⁷ *Allen v. Haskins*, 12 N. Y. Super. Ct. Rep. (5 Duer) 332.

⁸ See facts, *Wallace v. Bear River Water & Min. Co.*, 18 Cal. 461.

⁹ *Brown v. Buckingham*, 21 How. Pr. (N. Y.) 190, 11 Abb. Pr. 387.

¹⁰ *Smith v. Weed Sewing Machine Co.*, 26 Ohio St. 562.

¹¹ *Bernard v. Mullot*, 1 Cal. 368.

¹² *Wallace v. Bear River Water & Min. Co.*, 18 Cal. 461.

¹³ *Vassear v. Livingston*, 13 N. Y. 248, affirming 11 N. Y. Super. Ct. Rep. (4 Duer) 285.

¹⁴ *Kinney v. Miller*, 25 Mo. 576.

¹⁵ *McKinney v. Sundback*, 3 S. D. 106, 52 N. W. 322.

¹⁶ *McGuire v. Lamb*, 2 Idaho (West Pub. Co. ed.) 346, 17 Pac. 749; *Swanholm v. Reeser*, 2 Idaho (West Pub. Co. ed.) 1167, 31 Pac. 804.

California and other procedural codes do not expressly require the defendant in his answer to state the relief he demands,¹⁷ he must set forth whether he interposes a mere defense or a counter-claim.¹⁸ The statement should be expressly as a counter-claim; for if it is only in the form of defense to the action, the defendant may lose the benefit of affirmative relief.¹⁹ In California a counter-claim must be denominated as such in the answer in order to be effective.²⁰ In considering a counter-claim upon demurrer to it for alleged insufficiency, the facts alleged in the complaint, which are not inconsistent with the averments in the counter-claim, are to be taken as admitted.²¹ New matter in the answer, which does not constitute a counter-claim, is deemed controverted.²²

§ 1184. — MAY OR MAY NOT BE SET UP WHEN—IN GENERAL. The general rule is that matters *ex delicto* can not be pleaded to matters *ex contractu*, and vice versa.¹ It is, however, held that, in an action upon a contract for money expended by a tenant in repairing a hotel, the owner of the building may defend by showing that the building was burned in consequence of the carelessness of the tenant.² A fraudulent representation as to the number of acres of land leased is proper matter of counter-claim to reduce the stipulated rent by the amount of damage actually sustained. But if no such counter-claim is pleaded, and there is no averment of damage by reason

¹⁷ See, ante, § 1177.

¹⁸ *Clough v. Murray*, 19 Abb. Pr. (N. Y.) 97.

¹⁹ *Bates v. Rosekrans*, 23 How. Pr. (N. Y.) 89; affirmed, 37 N. Y. 409, 4 Abb. Pr. N. S. 276, 4 Transc. App. 332.

Compare: *Burrall v. De Groot*, 12 N. Y. Super. Ct. Rep. (5 Duer) 379.

²⁰ *Carpenter v. Hewel*, 67 Cal. 589, 8 Pac. 314.

²¹ *Graham v. Dunnigan*, 13 N. Y. Super. Ct. Rep. (6 Duer) 629, 4 Abb. Pr. 426.

²² *Garner v. Manhattan Building Assoc.*, 13 N. Y. Super. Ct. Rep. (6 Duer) 539.

¹ *Brower v. Nellis*, 6 Ind. App. 323, 33 N. E. 672; *Davis v. Frederick*, 6 Mont. 301, 12 Pac. 664; *Braithwaite v. Akin*, 3 N. D. 365, 56 N. W. 133.

² *Zigler v. McClellan*, 15 Ora. 499, 16 Pac. 179.

of the representations, the alleged fraud is no defense.³ In an action for unlawful detainer, it is not admissible to set up a counter-claim for damages on account of loss of business, depreciation in the value of furniture purchased for use on the leased premises, and for repairs, which are alleged as the result of acts on the part of the landlord.⁴ A defendant in an action in which a writ of attachment has been issued and levied can not set up a counter-claim for damages sustained by reason of an excessive levy under the writ.⁵ A defense set up by way of counter-claim, alleging the plaintiff's indebtedness in certain distinct sums, without alleging that said sums are due, or that the defendant is entitled to credit therefor on the demand sued on, is no defense.⁶ A stockholder who is a creditor of the corporation can not offset his unpaid subscription as against the general indebtedness of the corporation.⁷ Where money is voluntarily paid by a county to a sheriff for services actually rendered, with full knowledge of all the facts, this payment can not be set up as an offset to a claim of the officer against the county on the ground that there was no legal obligation on the part of the county to make such payment.⁸ In an action in the Superior Court, arising upon contract, a counter-claim arising upon a different contract from that pleaded by the plaintiff, not set up as a defense but as a ground for an affirmative judgment against the plaintiff, is not within the jurisdiction of the Superior Court where the amount of the claim is less than three hundred dollars, and any action thereon must be by independent suit in the justices' court.⁹

³ *Holton v. Noble*, 83 Cal. 7, 28 Pac. 58.

⁴ See: *Kelly v. Teague*, 63 Cal. 68, 69; *Borden v. Sackett*, 113 Mass. 214; *Ralph v. Lomer*, 3 Wash. 402, 28 Pac. 760.

⁵ *Esbensen v. Hover*, 3 Colo. App. 467, 33 Pac. 1008.

⁶ *Swanholm v. Reeser*, 2 Idaho

(West Pub. Co. ed.) 1167, 31 Pac. 804.

⁷ *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 7 Pac. 68.

⁸ *Randall v. Lyon County*, 20 Nev. 35, 14 Pac. 583.

⁹ *Griswold v. Pieratt*, 110 Cal. 259, 42 Pac. 820.

§ 1185. ——— JOINT AND SEVERAL CLAIMS. To justify the allowance of a set-off of joint debt due from plaintiff and another against the individual claim of plaintiff, upon equitable grounds, it is not sufficient to show that the joint debtors owe a considerable amount, and that their property is incumbered by judgments, mortgages, and attachments, without showing that they are insolvent, or that the defendants are in danger of losing their demand.¹ A joint claim by two persons can not be pleaded as a counter-claim by one defendant.² Thus, a cause of action arising on the liability, promise, or undertaking of a partnership is a joint one only, and, in an action thereon against the members of the firm, one of the defendants can not maintain a counter-claim arising in a cause of action existing in his own favor.³ But he may amend, and allege that the whole interest therein had been transferred to him.⁴ Demands being joint and several are not, strictly speaking, due in the same right; yet if the legal and equitable liabilities or claims of many become vested in or may be urged against one, they may be set off against separate demands, and vice versa.⁵ Defendants jointly and severally liable to satisfy the plaintiff's demand may set off a demand due from the plaintiff to one of the defendants alone.⁶ In an action against two or more joint debtors to enforce their joint liability, one of the defendants can not set up by way of counter-claim a cause of action existing in his favor alone against the plaintiff.⁷ A surety can not avail himself of a right his principal may have to recover damages for a breach of the principal's contract.⁸ A counter-claim alleging a

¹ Howard v. Shores, 20 Cal. 277.

² See authorities, footnote 4, this section.

³ Coleman v. Flavel, 12 Sawy. 465, 31 Fed. 392.

⁴ Stearns v. Martin, 4 Cal. 229;

⁵ Russell v. Conway, 11 Cal. 101; Collins v. Butler, 14 Cal. 223.

⁶ See: Sledge v. Swift, 53 Ala. 110; Curtis v. Sprague, 41 Cal. 59; King v. Wise, 43 Cal. 628; Harris v. Rivers, 53 Md. 216.

⁷ Roberts v. Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599.

⁸ Gillespie v. Torrance, 25 N. Y.

debt due the defendant and a former partner, or stranger to the suit, is bad, and a demurrer thereto is properly sustained.⁹ In an action on contract a right of action in favor of the defendants on an attachment bond given by the plaintiffs with two sureties in a former action on the same contract would not constitute a counter-claim.¹⁰ But in an individual action by a plaintiff who was a member of a partnership, the defendant may counter-claim the individual liability of the plaintiff for goods sold and delivered for the partnership upon the individual credit of the plaintiff.¹¹

§ 1186. — ELECTION OF REMEDY. A defendant may elect whether he will set up a counter-claim arising out of a contract not connected with the contract upon which the plaintiff's cause of action is based, or whether he will bring a separate action;¹ and this is true equally in the case where (1) defendant claims a deduction merely, (2) where the two claims are equal to each other, or (3) where there is an excess in favor of the defendant for which he seeks a recovery.² But as to a counter-claim arising out of the transaction set out in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the plaintiff's cause of action, if he omit to set it up, neither he nor his assignee can afterwards maintain an action thereon.³ An omission to assert a cross-claim, when a demand is presented for payment, does not involve a waiver of a counter-claim; nor is a

306, 82 Am. Dec. 355; *La Farge v. Halsey*, 14 N. Y. Super. Ct. Rep. (1 Bosw.) 171, 4 Abb. Pr. 397.

⁹ *Hook v. White*, 36 Cal. 299; *McGuire v. Lamb*, 2 Idaho (West Pub. Co. ed.) 246, 17 Pac. 749.

¹⁰ *Schuster v. Thompson*, 6 Dak. 10, 50 N. W. 125.

¹¹ *Brown v. Fresno Raisin Co.*, 101 Cal. 222, 35 Pac. 639.

¹ *Stoddard v. Treadwell*, 26 Cal. 294, 305.

² *Id.*; *Rulz v. Norton*, 4 Cal. 357; *Earl v. Bull*, 15 Cal. 425; *Frothingham v. Everton*, 12 N. H. 239; *Cook v. Mosely*, 13 Wend. (N. Y.) 277.

³ See *Kerr's Cyc. Cal. Code Civ. Proc.*, 2d ed., § 439, Consolidated Supp. 1906-1913, p. 1462.

As to election to set up a counter-claim. See *Douglass Co. v. Moler*, 3 Misc. (N. Y.) 373, 30 Abb. N. C. 293, 22 N. Y. Supp. 1045.

failure to discharge an unfaithful servant, before his term of service has expired, a release of damages arising from his neglect.⁴ In an action founded on contract, the defendant may set up by way of counter-claim a cause of action existing in his favor against the plaintiff for a balance due on an open mutual and current account, notwithstanding a prior action brought by him against the plaintiff on certain items of the account is still pending and undetermined. In such case, the defendant need not dismiss the prior action, nor elect between it and the counter-claim.⁵

§ 1187. — JUDGMENT ON IN EXCESS OF PLAINTIFF'S DEMAND. Under the California procedural code, if a counter-claim, established at the trial, exceeds the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.¹ But it has been said that where a counter-claim for damages is in excess of the amount claimed by the plaintiff, and where an assignor of the latter claim was not a party to an original suit brought by the plaintiff in the action for damages, it is improper to set up the claim against the plaintiff as a counter-claim. In order to recover the same, a separate suit must be instituted.²

§ 1188. RECOUPMENT—AS TO GENERALLY. We have already seen that what was heretofore known to the law as "recoupment" is comprehended within the counter-claims provided by the California procedural code, although the term "recoupment" is not to be found within that code.¹ "Recoupment" differs in some essential

⁴ Stoddard v. Treadwell, 26 Cal. 300.

⁵ Lindsay v. Stewart, 72 Cal. 540, 14 Pac. 516.

¹ Kerr's Cyc. Cal. Code Civ. Proc., § 666.

² Irvin v. Rapp, 9 Cal. App. 375, 99 Pac. 409.

¹ See, ante, § 1178.

particulars from set-off:² (1) In being confined to matters arising out of and connected with the transaction or contract upon which the suit is brought; (2) in having no regard to whether such matters be liquidated or unliquidated; (3) that the right of recoupment is not given or created by statute, but by the common law.³ At common law, however, the defendant could not have judgment for any excess in his favor; but it is now otherwise by statute in most of the states.

Codes provide recoupment in some of the jurisdictions, as in Georgia,⁴ in which latter code recoupment is defined as a right of a defendant to have a deduction from the amount of plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract. This is a narrowing of the common-law conception of a recoupment by limiting it to the contract sued on. At common law there could be a recoupment in an action founded on tort, but into which no element of contract entered. Thus, in an action for conversion or for the price of a chattel which the defendant had himself repaired or essentially enhanced the value of, at his own expense, under the belief that the title was in himself, was entitled to recoup the money and labor he had expended in the repair of the chattel and the enhanced value he had added to it.⁵ Both at common law and under code provision, where the procedural codes make provision by name for recoupment, the implication is that the plaintiff's claim is to be allowed, and that another cause of action is to be satisfied out of it,⁶—which is, properly speaking, an offset and not a recoupment. One

² As to sets-off, see, post, § 1189-1191.

³ See *Ward v. Fellers*, 3 Mich. 281, 287.

⁴ Ga. Civ. Code, 1895, § 3756.

⁵ *Barbor v. Chapin*, 28 Vt. 413.

See, also, authority footnote 7, this section.

⁶ *Xenia Branch of State Bank of Ohio v. Lee*, 15 N. Y. Super. Ct. Rep. (2 Bosw.) 694, 7 Abb. Pr. 372.

of the characteristics of a recoupment is that it is not always a subsisting claim,⁷ and in this respect differs materially from a counter-claim, which can be founded upon a fully-matured claim only.⁸

Court use of term "recoupment" is often loose and ill-advised, being treated as synonymous with counter-claim, which it is not, strictly and accurately speaking. The use of the word "recoupment" as synonymous with "counter-claim" under the code is frequently met with in the New York decisions.⁹

§ 1189. SET-OFF—IN GENERAL. That what was heretofore known as a set-off is comprehended within the provisions of the California procedural code and other codes, has already been pointed out.¹ A set-off was unknown to the common law, according to which mutual debts were distinct, and inextinguishable, except by actual payment or release.² It was first provided for by statute during the reign of the second George,³ which statute has been generally adopted in the United States, with some modifications. Set-off could only take place in actions on contracts for the payment of money, and the matters which might be set off were mutual liquidated debts or damages. Unliquidated damages could not be set off. The statutes in regard to set-off refer only to mutual unconnected debts; for at common law, when the nature of the employment, transaction, or dealings necessarily constitutes an account consisting of payments, debts, and

⁷ Kneedler v. Sternberg, 10 How. Pr. (N. Y.) 67, 72.

⁸ See, ante, § 1178.

⁹ As in Thomson-Houston Electric Co. v. Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. 7, reversing 4 Misc. 207, 23 N. Y. Supp. 900, in which the court uses the language: "The tenant, in a suit for rent, can recoup any damages for a breach

of the covenants to repair, and the landlord, if sued by a tenant for a breach of the covenants, on his part, could counter-claim the rent reserved by the lease." See Ely v. Splero, 28 App. Div. (N. Y.) 485, 51 N. Y. Supp. 124.

¹ See, ante, § 1178.

² Otty v. Ferguson, 1 Rawle (Pa.) 293.

³ 2 Geo. II, ch. 22.

credits, the balance only is considered to be the debt, and, therefore, in an action in such cases it is not necessary either to plead or give notice of set-off.⁴ The principle upon which statutes of set-off are based is, that mutual debts between the parties are extinguished, if equal in amount, or pro tanto if unequal; thus preventing multiplicity of suits.

§ 1190. — DEFINITION AND NATURE: PLEADING. 'A' set-off may be properly defined, stripping it of useless incumbrances and phrases, as a reciprocal demand on the part of a defendant against the plaintiff, growing out of the same transaction as the action in which set up, where the parties have had dealings so as to create mutual debits and credits;¹ although not limited to the same transaction. Where there are several demands against the plaintiff in favor of the defendant, which are available to the defendant as a set-off, the defendant may set them all out in one defense, they being separately stated and described,²—and in this particular sets-off are distinguished from counter-claims.

In its nature, a set-off, like a counter-claim,³ is a cross-action, and may be a separate and independent demand not connected with the original cause of action,⁴ but it must be mutual between the parties to the action.⁵ A separate demand can not be set off against a joint demand, nor can a joint debt be set off against a separate debt.⁶ In this respect, the rules governing sets-off and counter-claims are the same.⁷ Thus, the individual indebtedness

⁴ *Globe Ins. Co., In re*, 2 Edw. Ch. (N. Y.) 625, 627; *Green v. Farmer*, 4 Burr. 2221. Ala. 259; *Raymond v. State*, 54 Miss. 562, 28 Am. Rep. 382.

¹ See *Globe Ins. Co., In re*, 2 Edw. Ch. (N. Y.) 625, 627.

² *Ranney v. Smith*, 6 How. Pr. (N. Y.) 420.

³ See, ante, § 1179.

⁴ *Washington v. Timberlake*, 74

⁵ *Woolman v. Capital Nat. Bank*, 2 Colo. App. 454, 31 Pac. 235.

⁶ *Ingols v. Plimpton*, 10 Colo. 535, 16 Pac. 155; *Burngwin v. Babcock*, 11 Ill. 28; *Hilliburton v. Clapp*, 36 N. Y. Supp. 1041.

⁷ See, ante, § 1185.

of a partner can not be set off against a debt to the firm except by special contract, or consent of all the partners;⁸ and, as a general rule, a claim for unliquidated damages can not be pleaded by way of set-off,⁹ but mutual judgments may be set off the one against the other.¹⁰ A surety jointly bound with his principal may, independently of statute, offset against such joint indebtedness his individual claim against the creditor in such joint indebtedness, where both the creditor and the principal are insolvent.¹¹ In an action for partition of lands, the defendants may set off moneys paid out at request of the plaintiffs in defending the title to the lands.¹² And if necessary improvements were made upon the land by the defendants, such improvements may equitably be considered in connection with the claim for use and occupation, the one offsetting the other.¹³ One who buys a set-off to a claim against him, without notice of a prior

⁸ *Morganthau v. King*, 15 Colo. 413, 24 Pac. 1048; *McAllister v. Millhiser*, 96 Ga. 474, 23 S. E. 502; *Lee v. Longbottom*, 173 Pa. St. 408, 34 Atl. 436.

⁹ *Rice v. Sanders*, 152 Mass. 108, 23 Am. St. Rep. 804, 8 L. R. A. 315, 24 N. E. 1079.

¹⁰ *Simmons v. Reid*, 31 S. C. 389, 17 Am. St. Rep. 36, 9 S. E. 1058. See: *Lee v. Lee*, 31 Ga. 26, 76 Am. Dec. 681; *Skrine v. Simmons*, 36 Ga. 402, 91 Am. Dec. 771; *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280; *Gunn v. Todd*, 21 Mo. 303, 64 Am. Dec. 231; *Hovey v. Morrill*, 61 N. H. 9, 60 Am. Dec. 315; *People ex rel. Manning v. Common Pleas Court*, 13 Wend. (N. Y.) 649, 28 Am. Dec. 495; *Ramsey's Appeal*, 2 Watts (Pa.) 228, 27 Am. Dec. 301; *Thorp v. Wegefarth*, 56 Pa. St. 82, 93 Am. Dec. 789.

See, also, note 13 Am. Dec. 729-731.

In South Dakota, such is the statutory provision.—See: S. D. Comp. Laws, § 5109; *Pirie v. Harkness*, 3 S. D. 178, 52 N. W. 581.

Under Indiana statute, in an action to set off judgments founded upon contract, obtained by plaintiff and defendant against each other, defendant may defeat plaintiff's set-off by showing that his judgment is within the exemption allowed by law.—*Carpenter v. Cool*, 115 Ind. 134, 17 N. E. 266.

¹¹ *Hobbs v. Duff*, 23 Cal. 597; *Coffin v. McLean*, 80 N. Y. 560; *Clark v. Sullivan*, 2 N. D. 103, 49 N. W. 416; *Seligman v. Heller Bros. Clothing Co.*, 69 Wis. 410, 34 N. W. 232.

¹² *Blackwell v. McLean*, 9 Wash. 301, 37 Pac. 317.

¹³ *Id.*; *Carver v. Coffman*, 109 Ind. 547, 10 N. E. 567.

assignment of such claim, may use the set-off as a defense, the same as though the claim against him had not been assigned.¹⁴ But a defendant can not avail himself, by way of set-off, of a demand against the plaintiff which he has purchased for the purpose of so using it, after the commencement of the plaintiff's action.¹⁵ A set-off, strictly speaking, is not a defense in the action in which it is filed, but is a cross-action and must contain all the substantial averments necessary to make a good complaint, and must, as to its sufficiency, be considered in the nature of a complaint.¹⁶ As a defense it must be specially pleaded, and evidence of set-off can not be introduced under the general denial.¹⁷ A set-off may be pleaded to a set-off by way of reply,¹⁸ in those jurisdictions in which a reply is provided for and allowed. The averments in a plea of set-off are sufficient in those cases in which they would disclose a good cause of action if embodied in a complaint.¹⁹

§ 1191. — EQUITABLE DEFENSES AND SETS-OFF. The defendant has a right to set up an equitable defense in an action at law, but in those cases in which he relies upon an equitable right as a cause of defense, he must plead the same as fully as if he were bringing an action in equity.¹ Thus, the equitable defense of fraud must be

¹⁴ *St. Louis Nat. Bank v. Gay*, 101 Cal. 286, 35 Pac. 876; *Clark v. Sullivan*, 3 N. D. 280, 55 N. W. 733.

¹⁵ *Todd v. Cutsinger*, 30 Mo. App. 145; *Enter v. Quesse*, 30 S. C. 126, 14 Am. St. Rep. 891, 8 S. E. 796.

¹⁶ See: *Ellis v. Cothran*, 117 Ill. 458, 3 N. E. 411; *Kennedy v. Richardson*, 70 Ind. 524.

¹⁷ *Odum v. Rutledge & J. R. Co.*, 94 Ala. 488, 10 So. 222; *Johnson v. Tyler*, 1 Ind. App. 387, 27 N. E. 643.

¹⁸ *Peden v. Mall*, 118 Ind. 556,

20 N. E. 493; *Chaplin v. Sullivan*, 128 Ind. 50, 27 N. E. 425.

¹⁹ *Breen v. Sullivan*, 5 Ill. App. 449; *Staab v. Ortiz*, 3 N. M. 53, 1 Pac. 857.

¹ CAL.—*Carpentier v. Oakland, City of*, 30 Cal. 439; *Bruck v. Tucker*, 42 Cal. 346; *Macauley v. Fulton*, 44 Cal. 355, 362; *Miller v. Fulton*, 47 Cal. 146, 147; *Kentfield v. Hayes*, 57 Cal. 409, 411; *Arguello v. Bours*, 67 Cal. 447, 450, 451, 8 Pac. 49; *Swasey v. Adair*, 88 Cal. 179, 25 Pac. 1119; *Dondero v. O'Hara*, 3 Cal. App. 633, 637,

fully pleaded,² and the answer must show a "live equity," not one barred by the statute of limitations.³ In those cases in which the defendant sets up an equitable defense he becomes an "actor" as to such equitable defense, and the defense must be of such a character that it can be ripened into a decree in his favor.⁴ Equitable as well as legal demands may be set up as counter-claims.⁵ Even when an equitable defense is made to an action at law, jurisdiction is to be determined by presuming everything to be of common-law cognizance, until the necessity of making equity jurisdiction appears.⁶ Matters of purely legal cognizance in no way connected with the suit, and not arising out of the transaction upon which the plain-

86 Pac. 985. COLO.—Davis v. Holbrook, 25 Colo. 493, 495, 55 Pac. 730. MONT.—Reece v. Roush, 2 Mont. 586, 590. NEB.—Dale v. Hunneman, 12 Neb. 221, 224, 10 N. W. 711. ORE.—Hatcher v. Briggs, 6 Ore. 31, 41; South Portland Land Co. v. Munger, 36 Ore. 457, 472, 54 Pac. 815, 60 Pac. 5. UTAH—Kahn v. Old Telegraph Min. Co., 2 Utah 174, 195, 11 Merr. Min. Rep. 643. FED.—Gibson v. Chateau, 80 U. S. (13 Wall.) 92, 103, 20 L. Ed. 534; Basey v. Gallagher, 87 U. S. (20 Wall.) 670, 680, 22 L. Ed. 452, affirming 1 Mont. 457.

"The general doctrine, resulting from the best-considered cases, is that the defendant can defeat the action upon equitable principles, and not only defeat the action, but secure affirmative relief; and that as the defendant becomes an actor, and the pleading is an equity pleading, the sufficiency thereof in substance, though not in form, is to be determined by the application of the general rules of equity pleading, and that as an equitable

defense may be set up to a legal claim, it would be inconsistent to lay down the doctrine, that because one party is asserting a right under a legal form, that equity will not protect the equitable rights of the other party to the same extent as though the proceeding was under equitable forms."—Hatcher v. Briggs, 6 Ore. 3140-41.

² Carpentier v. Oakland, City of, 30 Cal. 439, 442-5.

See, also, ante, § 1086, discussion and authorities.

³ Id.; Jackson v. Lodge, 36 Cal. 55; Lyon v. Petty, 65 Cal. 322, 325, 4 Pac. 103.

Compare: McColgan v. Muirland, 2 Cal. App. 6, 12, 82 Pac. 1113.

⁴ Swasey v. Adair, 88 Cal. 179, 182, 25 Pac. 1119.

⁵ Currie v. Cowles, 19 N. Y. Super. Ct. Rep. (6 Bosw.) 452; Lemon v. Trull, 13 How. Pr. (N. Y.) 248; affirmed, 16 How. Pr. 576, note.

⁶ Brown v. Hazard, 2 Wash. Tr. 464, 8 Pac. 494.

tiff bases his claim for relief, can not be pleaded as counter-claims in a suit in equity.⁷ A mistake in a contract, and a claim to have it reformed, may be set up as a counter-claim.⁸ But in cases of an equitable nature, substantially the same limitation is applied as was in respect to filing cross-bills in chancery, which were allowed only as to matters touching the matters in the original bill.⁹ A court of equity will compel an equitable set-off when parties have mutual demands against each other.¹⁰ Equity will not set off the claim of an individual creditor of one joint owner of a judgment against the judgment; and if the judgment be partnership assets, the individual creditor has no claim to any part of it until adjustment of the firm accounts.¹¹ The set-off will be allowed as between the real parties in interest, regardless of a nominal party.¹² The assignee of a judgment, purchasing in good faith and for a valuable consideration, takes the same subject to the right of set-off,¹³ where the record of the judgment or the proceedings in the cause disclose an equitable right to set-off in favor of the defendant and against the plaintiff,¹⁴ because he is chargeable with notice of any rights which the record plainly discloses.¹⁵

⁷ *Sears v. Martin*, 22 Ore. 311, 29 Pac. 890.

⁸ *Wemple v. Stewart*, 22 Barb. (N. Y.) 154.

⁹ *Burns v. Nevin*, 27 Barb. (N. Y.) 493.

¹⁰ *Russell v. Conway*, 11 Cal. 93; *Hobbs v. Duff*, 23 Cal. 596; *Burton v. Willin*, 6 Houst. (Del.) 522, 22 Am. St. Rep. 363; *Potter v. Lohse*, 31 Mont. 91, 98, 77 Pac. 419; *Hovey v. Morrill*, 61 N. H. 9, 13, 60 Am. Rep. 315.

Fraudulent assignment by one of the parties will not prevent a court of equity from setting off one judgment against the other.—*Hovey v. Morrill*, 61 N. H. 9, 13,

1 Code Pl. and Pr.—100

60 Am. Rep. 315; *Duncan v. Bloomstock*, 2 McL. (S. C.) 318, 13 Am. Dec. 728, where, in anticipation of an application for a set-off, an assignment was made for the purpose of defeating it.

¹¹ *Collins v. Butler*, 14 Cal. 223, 227.

See, also, note 11 Am. Dec. 737.

¹² *Hobbs v. Duff*, 23 Cal. 596, 626.

¹³ *Id.*

¹⁴ *Id.*; *Lockwood v. Bates*, 1 Del. Ch. 435, 12 Am. Dec. 121.

¹⁵ *Hobbs v. Duff*, 23 Cal. 596, 626; *Griffiths v. Sears*, 112 Pa. St. 523, 4 Atl. 492.

See note 78 Am. St. Rep. 55, 56.

§ 1192. **CROSS-COMPLAINT — IN GENERAL.** The word “cross-complaint” may represent either (1) the cause of action of a defendant, or (2) the pleading a defendant files in a suit already pending in which he asks for affirmative relief.¹ A cross-complaint, both as a cause of action and as a pleading, has a close resemblance to a counter-claim,² and yet is distinguishable from a counter-claim.³ This distinction may be subtle, yet it is distinct and none the less definite. The distinction, technically speaking,—and I might add, accurately speaking,—between a cross-complaint and a counter-claim is not the same in all jurisdictions; in some of which the word “cross-complaint” is used in the sense of, and as synonymous with, “counter-claim,” and, in practice is, technically speaking, a mere counter-claim.⁴ But such a use of the words is an unnecessary and an unwarranted use of terms, leading to confusion, due to a failure to grasp the inherent, though subtle, distinction between the two things connoted. Statutory provisions may lead to this jumbling of ideas and mix-up of technical terms. It is unfortunately true that legislators are not always either wise or learned men, capable of comprehending, much less of drawing, fine distinctions in matters of law and of rights of litigants. Hence it is necessary the statutes of the particular jurisdiction shall be read in connection with the discussion and authorities cited on this topic.

More comprehensive matters are brought in by a cross-complaint than by a counter-claim; and it may bring in new parties, which a mere counter-claim can never do. Another prominent distinction between a cross-complaint and a counter-claim is found in the fact that where a defendant files a cross-complaint, an answer or reply must

¹ See *Standley v. Northwestern Mut. Life Ins. Co.*, 95 Ind. 254.

² As to counter-claims, see, ante, §§ 1178-1187.

³ See, ante, § 1178, footnote 10 and text going therewith.

⁴ *Douthitt v. Smith*, 69 Ind. 463; *Standley v. Northwestern Mut. Life Ins. Co.*, 95 Ind. 254.

be filed thereto, or the material allegations thereof will be taken as true, whereas a pleading containing a mere counter-claim does not require to be answered or replied to.⁵ In those cases, however, in which an answer sets out affirmative matter which in no sense constitutes a cross-complaint under the provisions of the statute, a denial of its averments is not necessary.⁶ A cross-complaint must, in itself, state all the requisite facts to entitle the defendant to affirmative relief, and defects in it can not be cured by averments of any of the other pleadings in the action.⁷ The same requisites are essential in a counter-claim.⁸

§ 1193. — DEFINITION OF. A cross-complaint is an original action commenced by the filing of a pleading, in an action already pending, in which the defendant seeks affirmative relief. The defendant becomes an “original actor” in such new suit, and the pleading must be served on the parties affected thereby.¹ The plaintiff in the original suit, or other party declared against by the defendant in such new suit, becomes defendant under such cross-complaint.² A cross-complaint, as a pleading, is the statement by the defendant of a cause of action, and must contain all the necessary elements and averments requisite to the statement of a good cause of action in a complaint in an original proceeding; and the cause of action thus stated must (1) exist in connection with the original transaction³ upon which the plaintiff’s suit is founded, or (2) affect the property to which the original action, or the

⁵ Herold v. Smith, 34 Cal. 122.

⁶ Phillips v. Hagart, 113 Cal. 552, 554, 54 Am. St. Rep. 369, 45 Pac. 843.

⁷ Kreichbaum v. Melton, 49 Cal. 50.

⁸ Collins v. Bartlett, 44 Cal. 371; Quinn v. Smith, 49 Cal. 163; Coulthurst v. Coulthurst, 58 Cal. 239.

See, ante, § 1183.

See, also, discussion and authorities, ante, § 1190.

¹ As to service of cross-complaint, see, post, § 1197.

² Northwestern & Pacific Hypotheek Bank v. Ridpath, 29 Wash. 687, 70 Pac. 139.

³ As to what constitutes a “transaction” within the meaning of the procedural codes, see, ante, § 1180.

transaction upon which it is founded, relates.⁴ Whether third persons, not parties to the original action, can be brought in as defendants under a cross-complaint, depends upon the provisions of the statute of the particular jurisdiction. Where the plaintiff in the original action is the sole defendant, under the cross-complaint in such new action, it is, in effect, a counter-claim; where codefendants, or third persons not parties to the original action, are made defendants, it is a cross-complaint proper. As above noted, it is requisite that the subject-matter of the cause of action in the cross-complaint shall be the transaction which is the foundation of the original action, or the property affected thereby. In those cases in which affirmative relief is sought by a purported cross-complaint which does not relate to or depend upon the contract or transaction upon which the action is brought, or does not affect the property to which the original action relates, such affirmative matter does not in any sense constitute a cross-complaint.⁵ Matters set up which the defendant claims to be a defense, and also to entitle him to equitable relief, which do not grow out of the transaction set out in the complaint, are not properly inserted in the answer, either as a defense or as ground for affirmative relief.⁶ Thus, title to lands not described or included in the complaint can not be litigated by way of cross-complaint in the same action.⁷

§ 1194. — NATURE OF CROSS-COMPLAINT. A cross-complaint partakes of the nature of, and may properly be said to be largely governed by the general principles regulating, a cross-bill in chancery practice. That is to say, it is a separate suit by the defendant within a suit by the

⁴ Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456.

⁵ Mills v. Fletcher, 100 Cal. 142, 145, 34 Pac. 637; McFarland v. Matthal, 7 Cal. App. 599, 95 Pac. 179, 180.

⁶ Mitchell v. Mitchell, 41 Colo. 72, 91 Pac. 1103, 1104.

⁷ Worcester v. Kitts, 8 Cal. App. 181, 96 Pac. 335, 337.

plaintiff, against such plaintiff, or against other defendants in the original suit, or, under statute, against a third person not a party to the original suit, touching the matters in question in such original action, and brought for the purpose of obtaining full relief for all the parties in the matter involved in the original action.¹ In those cases in which the purpose is different from this, whether it be a cross-bill or a cross-complaint, the pleading will not be a cross-bill or a cross-complaint, as the case may be, though having a general connection with the original suit.² A cross-bill and a cross-complaint, alike, must contain within itself a distinct cause for relief to the de-

¹ GA.—Tison v. Tison, 14 Ga. 167, 171. IND.—Kemp v. Mitchell, 36 Ind. 239, 256; Summers v. Huston, 48 Ind. 228, 233. MICH.—Griffin v. Griffin, 112 Mich. 87, 70 N. W. 423. MISS.—Ladner v. Ogden, 31 Miss. 332, 340; Bishop v. Miller, 48 Miss. 364, 369-371. MO.—Boland v. Ross, 120 Mo. 208, 25 S. W. 524. N. H.—Kidder v. Barr, 35 N. H. 235, 251. N. J.—Krueger v. Ferry, 41 N. J. Eq. (14 Stew.) 432, 5 Atl. 452. S. C.—State v. Nathans, 49 S. C. 199, 218, 27 S. E. 52. TENN.—McRea v. University of the South, 52 S. W. 463; Perkins Oil Co. v. Eberhart, 107 Tenn. 409, 64 S. W. 760. VA.—Derbyshire v. Jones, 94 Va. 140, 142, 26 S. E. 416. WASH.—Hill v. Frink, 11 Wash. 562, 40 Pac. 128. W. VA.—West Virginia Oil & Oil Land Co. v. Vinal, 14 W. Va. 637, 677-9. FED.—Shields v. Barrow, 58 U. S. (17 How.) 130, 144, 15 L. Ed. 158; Ayres v. Carver, 58 U. S. (17 How.) 591, 595, 15 L. Ed. 179; Morgan's L. & T. R. & S. Co. v. Texas Cent. R. Co., 137 U. S. 171, 34 L. Ed. 625, 11 Sup. Ct. Rep. 61; First Nat. Bank v. Salem Capital Flour Mills Co., 31 Fed. 580,

584; Stonemetz Printers' Machine Co. v. Brown Folding Machine Co., 46 Fed. 851; North British Mercantile Ins. Co. v. Lathrop, 17 C. C. A. 175, 70 Fed. 429; Mercantile Trust Co. v. Atlantic & P. R. Co., 70 Fed. 518, 524; Thurston v. Big Stone Gap Improvement Co., 86 Fed. 484.

Object of cross-bill in equity is (1) to bring before the court new matter in aid of defense to the original bill; (2) discovery of facts from plaintiff or a codefendant in aid of defense to original bill; (3) affirmative relief as to matters in issue in the original bill; or (4) full relief for all the parties as to matters in issue in the original bill.—See: Harrison v. Harrison, 46 N. J. Eq. 75, 19 Atl. 126; Perkins Oil Co. v. Eberhart, 107 Tenn. 409, 67 S. W. 760; Springfield Milling Co. v. Barnard & Leas Mfg. Co., 26 C. C. A. 389, 81 Fed. 261; Blythe v. Hickley, 84 Fed. 228, 234.

² Armstrong v. Mayer, 69 Neb. 187, 95 N. W. 51; Krueger v. Ferry, 41 N. J. Eq. (14 Stew.) 432, 5 Atl. 452; Stuart v. Hayden, 18 C. C. A. 618, 72 Fed. 402.

fendant filing the same;³ and must be a mere defense or auxiliary suit dependent upon the original action,⁴ in so far as the equitable relief sought, or the equities between the codefendants, is the result of the plaintiff's action and litigation.⁵ A cross-complaint, like a cross-bill, is simply an answer to the original pleading, except that ground for relief to the defendant is shown which is not disclosed by the original pleading; and that being true, the cross-complaint, like the cross-bill, must contain a prayer for such relief as the party deems himself entitled to receive under the state of facts set forth.⁶ Lord Hardwick has said that "both the original bill and the cross-bill constitute but one suit, so intimately are they connected;"⁷ but it is now generally regarded that a cross-bill, or a cross-complaint, raises a new and distinct suit, which may run concurrently, or proceed side by side with the original action; that the hearing may be joint, that is, the court may hear all of the parties, receive all of the evidence, at the same time, and dispense exact justice to all the parties in one decree or judgment; or the hearing of

³ *Nichol v. Dunn*, 25 Ark. 129, 131.

⁴ IND.—*Frear v. Bryan*, 12 Ind. 343; *Summers v. Hutson*, 48 Ind. 228, 233; *Tippecanoe County Commrs. v. Lafayette, M. & B. R. Co.*, 50 Ind. 85, 102. MD.—*Hooper v. Central Trust Co.*, 81 Md. 559, 29 L. R. A. 262, 32 Atl. 505; *Chappel v. Chappel*, 86 Md. 532, 39 Atl. 984. MO.—*Joyce v. Growney*, 154 Mo. 253, 55 S. W. 466. N. H.—*Kladder v. Barr*, 35 N. H. 235, 251. S. C.—*State v. Nathans*, 49 S. C. 199, 218, 27 S. E. 52. WASH.—*Hill v. Frink*, 11 Wash. 562, 40 Pac. 128. W. VA.—*West Virginia Oil & Oil Land Co. v. Vinal*, 14 W. Va. 637, 677-9. FED.—*Ayres v. Carver*, 58 U. S. (17 How.) 591, 595, 15

L. Ed. 179; *Meissner v. Buek*, 28 Fed. 161; *Signal Co., Johnson R., v. Union Switch & Signal Co.*, 43 Fed. 331; *Stonemetz Printers' Machinery Co. v. Brown Folding Machine Co.*, 46 Fed. 851; *Port Royal & A. R. Co. v. South Carolina*, 60 Fed. 552; *Blythe v. Hinckley*, 84 Fed. 228, 234.

⁵ *Hergel v. Laitenberger*, 2 Tenn. Ch. 251, 354; *McRea v. University of the South (Tenn.)*, 52 S. W. 463, 466.

⁶ *Meissner v. Buek*, 28 Fed. 161.

⁷ *Field v. Schiffelin*, 7 Johns. Ch. (N. Y.) 252; *Hill v. Frink*, 11 Wash. 562, 40 Pac. 128; *Ayres v. Carver*, 58 U. S. (17 How.) 591, 595, 15 L. Ed. 179, 181; *Signal Co., Johnson R., v. Union Switch & Signal Co.*, 43 Fed. 331.

the one may be delayed until the other is disposed of;⁸ but the cross-bill, or cross-complaint, being auxiliary to and dependent upon the original suit, any decree, judgment or other disposition of the issues raised in such second suit prior to a final determination of the original suit will have to await final disposition of the original suit before further proceedings can be taken thereon,⁹ although the contrary has been held.¹⁰

§ 1195. — IN MONTANA. In the state of Montana, there is no such pleading as a cross-bill or cross-complaint. The only fact pleading allowed on the part of the defendant is an answer,¹ which must contain (1) a general or a specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief, or a specific admission or denial of some of the allegations of the complaint, and also a general denial of all the allegations of the complaint not specifically admitted or denied in the answer; (2) a statement of any new matter constituting a defense or counter-claim.²

§ 1196. — IN CALIFORNIA—CODE PROVISION. Under the California procedural code,¹ when the defendant seeks

⁸ Cross-complaint in an action at law, tendering equitable issues in defense to the law action, it is not error for the trial court to deny a motion for an order requiring the equitable issues thus raised to be tried in a court of equity before the trial of the law issues. — *Biermann v. Guaranty Mut. Life Ins. Co.*, 142 Iowa 341, 120 N. W. 963.

⁹ *South & North Alabama R. Co., ex parte*, 95 U. S. 221, 24 L. Ed. 355.

¹⁰ *Nicol v. Dunn*, 25 Ark. 129, 131.

¹ Montana Rev. Code, § 6530.

² *Alywin v. Morley*, 41 Mont. 191, 108 Pac. 778, 783, construing the above section with sections 6540 and 6541 of the Montana Revised Codes, in which a counter-claim is defined.

¹ As to form of answer and cross-complaint—Against plaintiff. —See *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 93, Form No. 69.

—Against codefendants.—*Id.*, p. 94, Form No. 70.

—Against third person not a party to the original suit.—*Id.*, p. 94, Form No. 71.

affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint.

The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint.

Parties affected by the cross-complaint not having appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action.²

Form in which originally enacted is that given above, except that the last clause, providing for summoning of parties who have not appeared in the action, is added. The legislature of 1906-7 amended the section by adding after the word "party," the words "to the action,"³ thus preventing the defendant from bringing in any third persons, not parties to the original suit, by means of a cross-complaint, even though they were vitally interested in the subject-matter of the cross-complaint.⁴ This amendment was entirely out of harmony with the spirit and purposes of the codes, no sensible grounds for its ever having been made, and it was repealed by the legislature of 1915.⁵

Justices' court is not within the provisions of the section. No such pleading as a cross-complaint is provided among the pleadings available to a defendant in a justices' court; the pleading is limited to actions in the Superior Court.⁶

² Kerr's Cyc. Cal. Code Civ. Proc., 2d ed., § 442, Biennial Supp. 1915, p. 3066.

³ Kerr's Consolidated Supp. to Cyc. Cal. Codes, 1906-1913, p. 1462.

⁴ Clark v. Kelley, 163 Cal. 207, 209, 124 Pac. 846; Merchant v.

Trust Co. v. Bentel, 10 Cal. App. 77, 101 Pac. 31.

⁵ Kerr's Biennial Supp. to Cyc. Cal. Codes, 1915, p. 3066.

⁶ Purcell v. Richardson, 164 Cal. 150, 128 Pac. 31.

§ 1197. — PROCEDURE ON FILING. In those cases in which the defendant files a cross-complaint in a pending action, a copy thereof must be served upon the parties to the action affected thereby;¹ and if a third person, not a party to the original action, is made a party defendant to the cross-complaint, a summons must be issued upon such cross-complaint and served upon the third person made a party defendant thereto, in the same manner as in the case of a complaint in an original action.² The cross-complaint may be served upon the persons who are parties to the original action, and affected by such cross-complaint, by delivering a copy thereof to such persons or to their attorneys in the action, and such a service will start the running of the time within which an answer must be filed thereto.³ After the service of a copy of the cross-complaint, where the parties affected have appeared in the action, and of the summons issued on the cross-complaint, where a third person not a party to the original action is made a defendant, the same proceedings, governed by the same rules, are to be had as in an original action on a complaint. We have already seen that the cross-complaint institutes a new suit within the original action,⁴ and that the hearing of the two causes may be held at the same time and as a part of the same proceeding, or separately, at the discretion of the trial court.⁵

§ 1198. — WHAT IS, AND WHAT IS NOT, A CROSS-COMPLAINT. Where the answer set up a set-off and counter-claim, and prayed for a judgment against the plaintiff for the amount alleged to be due, it is not a cross-complaint, and, therefore, does not require to be answered by the plaintiff.¹ A cross-bill, being an auxiliary bill, simply,

¹ See, ante, § 1196, paragraph two.

² See, ante, § 1196, paragraph three.

³ Ritter v. Braash, 11 Cal. App. 258, 260, 104 Pac. 592.

⁴ See, ante, § 1194.

⁵ Id., footnote 8 and text going therewith.

¹ Herald v. Smith, 34 Cal. 122;

Jones v. Jones, 38 Cal. 584.

A set-off is a counter-claim,

must be a bill touching matters in question in the original bill.² In the United States courts, the filing of a cross-bill on a petition, without the leave of the court, is an irregularity, and such cross-bill may be properly set aside.³ A cross-complaint is a pleading, by a defendant to an action, which contains a statement of facts sufficient to constitute a cause of action against the plaintiff in reference to the transaction upon which the original action is founded, or affecting property to which the original action relates.⁴ The parties named in the cross-complaint may be parties to the original action or parties who did not appear in the original suit,⁵ and the cross-complaint itself must contain all the facts necessary to constitute a cause of action in favor of the defendant and against the plaintiff in the original complaint,⁶ his codefendants or such third person. The defendant may, by his cross-complaint, bring in whatever parties are necessary to a determination of the controversy.⁷ A pleading improperly designated as a cross-complaint will not be treated as such. A portion of an answer introduced in language as follows: "And for

within this rule.—*Jones v. Jones*, 38 Cal. 584, 585.

Facts constituting defense should not be pleaded as a cross-complaint.—*Mills v. Fletcher*, 100 Cal. 142, 149, 34 Pac. 637.

² *Cross v. Del Valle*, 68 U. S. (1 Wall.) 1, 5, 17 L. Ed. 515, affirming 1 Cliff. 282, Fed. Cas. No. 3430.

³ *Bronson v. La Crosse & M. R. Co.*, 69 U. S. (2 Wall.) 283, 17 L. Ed. 725.

⁴ *Kerr's Cyc. Cal. Code Civ. Proc.*, §§ 438, 442; *Snow v. Holmes*, 71 Cal. 142, 11 Pac. 856.

⁵ See, ante, § 1196.

⁶ *Coulthurst v. Coulthurst*, 58 Cal. 239; *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456.

See, also, ante, § 1194.

⁷ CAL.—*Winter v. McMillan*, 87

Cal. 256, 265, 22 Am. St. Rep. 243, 25 Pac. 407; *Eureka, City of, v. Gates*, 120 Cal. 54, 58, 52 Pac. 125; *Lewis v. Fox*, 122 Cal. 244, 250, 54 Pac. 823; *Mackenzie v. Hodgkin*, 126 Cal. 591, 595, 77 Am. St. Rep. 209, 59 Pac. 36; *Alpers v. Bliss*, 145 Cal. 265, 571, 79 Pac. 171. IDAHO—*First Nat. Bank v. Bews*, 2 Idaho (West Pub. Co. ed.) 1175, 31 Pac. 816. ORE.—*Oatman v. Epps*, 15 Ore. 437, 15 Pac. 709. UTAH—*Chalmers v. Trent*, 11 Utah 88, 98, 99, 39 Pac. 488.

As to cross-complaint to bring in new parties, see note 26 L. R. A. (N. S.) 130.

Prayer to cross-complaint may include the bringing in of new parties.—*Eureka, City of, v. Gates*, 120 Cal. 54, 58, 52 Pac. 125.

a further and separate answer the defendant files her cross-complaint and alleges," etc., does not constitute a cross-complaint, or entitle the defendant to a judgment on the pleadings for failure of the plaintiff to answer thereto.⁸ A paper filed in an action by the plaintiff, and styled an "answer to the defendant's cross-complaint," will not be considered as a pleading when no cross-complaint is filed.⁹

Answer stating facts necessary to constitute a cause of action for a cross-complaint it is immaterial whether the defendant designates it an answer or a cross-complaint. It is the fact set up in the pleading which makes it the one or the other, and its character will be determined by the court.¹⁰ In an action sounding in tort, the defendant can not obtain affirmative relief by way of cross-complaint.¹¹ Where the defendant filed a cross-complaint seeking affirmative relief, and the plaintiff filed an answer thereto, the nonsuit of the plaintiff, upon the defendant's motion, does not operate as a dismissal of the action, so as to deprive the defendant of the right to a trial of the issues raised by the cross-complaint and answer thereto.¹²

Under Oregon practice, a defendant in an action at law has no right to file a complaint in equity, in the nature of

⁸ *Goldman v. Bashore*, 80 Cal. 146, 148, 22 Pac. 82.—See: *Doyle v. Franklin*, 40 Cal. 106, 111; *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456; *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747; *Banning v. Banning*, 80 Cal. 271, 13 Am. St. Rep. 156, 22 Pac. 210; *Cohn v. Kelly*, 132 Cal. 168, 469, 64 Pac. 709.

Prayer for affirmative relief to matters constituting a proper defense will not constitute the pleading a cross-complaint, and will be disregarded.—*Doyle v. Franklin*, 40 Cal. 106, 110-1; *Brannan v. Paty*, 58 Cal. 330, 331; *Shain v. Belvin*,

79 Cal. 262, 263, 21 Pac. 747; *Montana Co. v. Clark*, 42 Fed. 626, 627.

⁹ *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297, 13 Pac. 863; *Meeker v. Dalton*, 75 Cal. 154, 16 Pac. 764; *Mills v. Fletcher*, 100 Cal. 142, 34 Pac. 637.

¹⁰ *Holmes v. Richet*, 56 Cal. 307; *Gregory v. Bovier*, 77 Cal. 121, 19 Pac. 232.

¹¹ *Heilborn v. Kings River & Fresno Canal Co.*, 76 Cal. 11, 17 Pac. 933.

¹² See: *Mott v. Mott*, 82 Cal. 413, 419, 22 Pac. 1140; *Warner v. Darrow*, 91 Cal. 309, 27 Pac. 737.

a cross-bill, unless the complaint shows that he "is entitled to relief, arising out of facts requiring the interposition of a court of equity and material for his defense;" and where it appears from the complaint filed in such a case that the facts alleged, if true, would be available as a defense in the action at law, a general demurrer to the complaint is properly sustained.¹³

¹³ Scheffelin v. Weathered, 19 Ore. 172, 23 Pac. 898.

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CHAPTER XL

AMENDMENT OF PLEADINGS.

- § 1199. In general.
- § 1200. In California—Statutory provisions.
- § 1201. Amended pleading's relation to original.
- § 1202. Time of amending.
- § 1203. Manner of amending—New cause not to be stated.
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- § 1206. Amending prayer.
- § 1207. Amending as to damages—Complaint or prayer.
- § 1208. Amending to conform to proof.
- § 1209. Refusing leave to amend.
- § 1210. Procedure upon amending complaint — California practice.
- § 1211. — Demurrer to amended complaint.

§ 1199. IN GENERAL. The general rule in all the jurisdictions having reformed procedural codes is to allow amendments to the pleadings in furtherance of justice, and such amendments should be dealt with liberally by the trial courts.¹ In the exercise of a wise judicial discretion, such courts may allow amendments to any of the pleadings provided by law for either the plaintiff or the defendant, and such amendments may be allowed in almost any particular, ranging from a mere change in the manner of stating material facts,² to the allowance of a plea of the statute of limitations,³ or setting up matter in justifica-

¹ *Smith v. Dragert*, 65 Wis. 507, 27 N. W. 317; *Illinois Steel Co. v. Budzisz*, 106 Wis. 499, 503, 80 Am. St. Rep. 54, 48 L. R. A. 830, 82 N. W. 534; *Gates v. Paul*, 117 Wis. 170, 182, 94 N. W. 55; *Palmer v. Schultz*, 138 Wis. 455, 120 N. W. 348.

² *Post v. Campbell*, 110 Wis. 383, 85 N. W. 1032.

³ *Wheeler v. Castor*, 10 N. D. 347, 355, 61 L. R. A. 746, 755, 92 N. W. 381; *Whereatt v. Worth*, 108 Wis. 301, 81 Am. St. Rep. 899, 85 N. W. 441.

Error to allow statute set up by

tion, in an action for an assault or assault and battery, even after verdict rendered.⁴ Thus, in a cause charging personal injuries through the negligence of the defendant, the plaintiff may be permitted to so amend his complaint as to charge the defendant with negligence in failing to warn inexperienced workmen of danger, whereas in the original complaint the cause of action was based on negligence of the defendant in using defective machinery.⁵ Pleadings may be amended at any time to conform them to the proof.⁶ Refusal to allow an amendment to a pleading, in a case where it will work great injustice to the opposite party in the cause, will not be an abuse of judicial discretion.⁷ Under the statute, to allow amendments is the rule; to deny them is the exception. The courts allow them with great liberality, where they do not change the nature of the action or mislead the adverse party to his prejudice, going even to the extent of permitting them after verdict and judgment.⁸

Imposition of terms upon granting leave to amend is a matter resting in the sound discretion of the trial court,

amendment on trial without a showing of a sufficient excuse for the delay, or the imposition of terms.—*Sullivan v. Collins*, 107 Wis. 293, 83 N. W. 310.

Equity will not cancel mortgage on real property merely because the statute of limitations is available as a defense.—*Tracy v. Wheeler*, 15 N. D. 248, 255, 6 L. R. A. (N. S.) 522, 107 N. W. 68.

Limitations pleaded in answer to merits is within the meaning of an order setting aside a default judgment and setting the cause down for "trial on the merits."—*Lilly-Brackett Co. v. Sonnemann*, 157 Cal. 192, 197, 21 Ann. Cas. 1279, 106 Pac. 715.

⁴ *Price v. Grzyll*, 133 Wis. 625, 114 N. W. 100.

⁵ *Rahles v. Thompson & Sons Mfg. Co., J.*, 137 Wis. 510, 23 L. R. A. (N. S.) 298, 118 N. W. 350.

⁶ *Kleimenhagen v. Dixon*, 122 Wis. 531, 100 N. W. 826.

See, also, post, § 1208.

⁷ *Palmer v. Schultz*, 138 Wis. 459, 120 N. W. 348.

⁸ *Warmall v. Reins*, 1 Mont. 627; *Hershfield v. Aiken*, 3 Mont. 443; *Williston v. Camp*, 9 Mont. 88, 22 Pac. 501; *Merrill v. Miller*, 28 Mont. 134, 72 Pac. 423; *Borden v. Lynch*, 34 Mont. 503, 87 Pac. 609; *Leggat v. Palmer*, 39 Mont. 302, 102 Pac. 327.

whose action is not to be disturbed or reviewed except in the case of abuse.⁹

§ 1200. IN CALIFORNIA—STATUTORY PROVISION. Under the California procedural code, any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, who may have ten days thereafter in which to answer or demur to the amended pleading. A demurrer is not waived by filing an answer at the same time; and when the demurrer to a complaint is overruled and there is no answer filed, the court may, upon such terms as may be just, allow an answer to be filed. If a demurrer to the answer be overruled, the facts alleged in the answer must be considered as denied, to the extent mentioned in section four hundred and sixty-two.¹ Similar statutory provisions are found in other jurisdictions having the reformed procedure. Where a defendant does not stand upon his motion to strike out an amended pleading, but participates in the trial under such amended pleading, he will be precluded from making the trial court a place of chance and seek to have the trial on the merits, to which he had voluntarily joined issue, set aside for error committed, if at all, in the ruling on the motion.²

§ 1201. AMENDED PLEADING'S RELATION TO ORIGINAL. An amended pleading is regarded as a continuation of the original pleading, and generally relates back and takes effect as of the date when the original petition was filed.¹ In those cases in which a pleading is amended, the part removed by the amendment is dropped out of the case, and

⁹ *Pappe v. Post*, 23 Okla. 581, 101 Pac. 1055.

¹ *Kerr's Cyc. Cal. Code Civ. Proc.*, § 472.

² *Scovill v. Glasner*, 79 Mo. 449; *Liese v. Meyer*, 143 Mo. 547, 45

S. W. 282; *Jones v. Springfield Traction Co.*, 137 Mo. App. 408, 118

S. W. 675, 676.

¹ *Bick v. Vaughn*, 140 Mo. App. 595, 120 S. W. 618, 620.

neither the pleading nor the pleader can in any way be prejudiced by it.² Intervening of the statute of limitations between the date on which the original complaint is filed and the time when an amendment thereof is presented to the court, in which it was stated that the plaintiff "had duly performed each and all of the obligations in said contract binding on him," was held not to prevent the filing of the amendment, because, so far as the statute of limitations was concerned, the amendment related back to the time when the original complaint was filed.³

§ 1202. TIME OF AMENDING. The California code provisions as to amendments have been set out above,¹ under which provisions it is held that equal rights to amend are given to both parties; that the right of plaintiff to amend his complaint as of course is extended only up to the time when the answer of the defendant is filed, or, if a demurrer is interposed by defendant, only while the issue of law raised thereby is undetermined. If the defendant answers without demurring, or if his demurrer to the complaint is overruled, the right of plaintiff under the section to amend as of course is gone. The right of defendant to amend can be exercised only during the time that a demurrer to the answer as interposed by the plaintiff is undetermined; or should the plaintiff not demur, then the defendant is concluded from amending as of course under the section, by the expiration of the time within which such demurrer might have been interposed. When the demurrer of the plaintiff to the answer is overruled, or the time has expired within which the plaintiff might have demurred to the answer, the issues of fact are then fully

² Kersten v. Welchman, 135 Wis. 1, 114 N. W. 500.

³ McAuley v. Casualty Company of America, 39 Mont. 185, 102 Pac. 586, 590 (action upon accident in-

surance policy), citing Clark v. Oregon Short Line R. Co., 38 Mont. 177, 99 Pac. 298.

¹ See, ante, § 1200.

joined, and the right of defendant to amend under the section as of course is gone.²

Any time before judgment, and sometimes after verdict,³ the parties are ordinarily entitled to amend.⁴ The court may refuse the plaintiff leave to amend at the trial, where the proposed amendment is opposed on the ground that the defendant is not prepared to meet the allegations contained therein, and where no excuse is offered for the procrastination of the plaintiff in proposing the matters contained in the amendment.⁵ But an amendment to the pleading may be made during the course of the trial without a formal showing, for the reason that the court is acquainted with the facts, and, in the exercise of a sound discretion, should allow amendments in the interest of justice, unless in consequence of the exercise of such discretion some injury results to the defendant.⁶ To permit an amendment to a complaint on the trial does not constitute error where it appears from the record that defendants were not surprised, and that they did not ask to have a continuance of the trial on account of allowance of the amendment, and where evidence of the matter pleaded in the amendment was admissible under the original complaint.⁷ When an amendment to a complaint is allowed at a trial which materially changes the matters which may be considered in estimating the damages claimed by the plaintiff, the court should allow the defendant a reasonable time, upon a proper showing and request, within which to prepare to meet the case made by the amend-

² *Tingly v. Times Mirror Co.*, 151 Cal. 1, 89 Pac. 1097, 1101.

³ See, ante, § 1199, footnote 4, and text.

⁴ *Spokane Valley L. & W. Co. v. Jones & Co.*, Arthur D., 53 Wash. 37, 101 Pac. 515, 518.

⁵ *O'Neill v. Adams*, 144 Iowa 385, 122 N. W. 976, 979.

¹ Code Pl. and Pr.—101

⁶ See: *Cascade Ice Co. v. Austin Bluff L. & W. Co.*, 23 Colo. 292, 47 Pac. 268; *Jordan v. Greig*, 33 Colo. 360, 80 Pac. 1045; *Harrison v. Carlson*, 45 Colo. 55, 101 Pac. 76, 78; *Davis v. Johnson*, 4 Colo. App. 545, 36 Pac. 887.

⁷ *Ryder-Gougar Co. v. Garretson*, 53 Wash. 71, 132 Am. St. Rep. 1053, 101 Pac. 499, 500.

ment.⁸ Where a cause is reversed and remanded by the Supreme Court with directions to the trial court to "take such other and further proceedings in the matter as shall accord with said Supreme Court opinion," it stands in the court below the same as if no trial had been had. Pleadings may be amended, supplementary pleadings filed, and new issues formed under proper restrictions.⁹

§ 1203. MANNER OF AMENDING—NEW CAUSE NOT TO BE STATED. An original pleading is usually to be amended on the lines of the theory of the case as expressed in such original pleading. The cause of action set forth upon which the action is founded may be better pleaded or differently alleged, but in no case can the cause of action be changed, or a new cause of action substituted for the one originally alleged.¹ The test by which the proposition as to whether a new pleading is an amendment or a substitution of another and distinct cause of action are, first, whether the same evidence will support the allegations of both the original and amended complaints, and, second, whether the same measure of damages will apply to the cause stated in both the original and amended complaints. If these questions may be answered in the affirmative, it is an amendment; if they are to be answered in the negative, it is said to be a substitution of a new cause of action.² Aside from the tests above given, it is said to be a

⁸ *Harrison v. Carlson*, 45 Colo. 55, 101 Pac. 76; *Flint v. Atlas Mut. Ins. Co.*, 134 Iowa 531, 112 N. W. 1; *Chicago, R. I. & G. R. Co. v. Gro-ner*, 100 Tex. 414, 100 S. W. 137.

⁹ *Consolidated Steel & Wire Co. v. Burnham, etc., Co.*, 8 Okla. 514, 58 Pac. 654; *Ball v. Rankin*, 23 Okla. 801, 101 Pac. 1105.

¹ *Farmington, City of, v. Farmington Tel. Co.*, 135 Mo. App. 697, 116 S. W. 485, 487.

² *Lumpkin v. Collier*, 69 Mo. 170; *Scovill v. Glasner*, 79 Mo. 449;

Sauter v. Loveridge, 103 Mo. 621, 15 S. W. 981; *Heman v. Glann*, 129 Mo. 325, 31 S. W. 589; *Liese v. Meyer*, 143 Mo. 547, 45 S. W. 282; *Ross v. Cleveland & A. Mineral Land Co.*, 162 Mo. 317, 62 S. W. 984; *Grisby v. Barton County*, 169 Mo. 221, 69 S. W. 296; *McHugh v. St. Louis Transit Co.*, 190 Mo. 85, 88 S. W. 853; *Holliday v. Jackson*, 21 Mo. App. 660; *Burnham v. Tillery*, 85 Mo. App. 453; *Haines v. Pearson*, 107 Mo. App. 481. 81 S. W. 645; *Wasson v. Boland*, 136

fair criterion, in determining whether a new cause of action is alleged in the amendment, to inquire if a recovery had upon the original complaint would be a bar to any recovery under the amended complaint, or if both the original and amended complaints are subject to the same plea;³ or if the same measure of damages is applicable.⁴

New cause of action can not be said to be stated by an amended complaint which merely states the original cause of action with more detail of averment, or more specifically, than is required.⁵ An amendment which simply alleges omitted facts under which the relief could be effectively granted, held not a statement of another cause of action.⁶ And an amended complaint is not a departure where it relates to the same matters, calls for the same measure of damages, and might be supported by the same evidence as the original one.⁷ Where the original petition states a common-law action for conspiracy, and the amended petition a cause of action provided by the statute, but barred by the statute of limitation at the time of the filing of the amendment, this was an entire departure from, or a substitution of, one cause of action for another, which is not permissible.⁸

§ 1204. AMENDING COMPLAINT. A complaint may be amended by the plaintiff once “of course,”¹ without leave of the court on stipulation of the parties;² but all

Mo. App. 622, 118 S. W. 663; Bick v. Vaughn, 140 Mo. App. 595, 120 S. W. 618.

³ Bick v. Vaughn, 140 Mo. App. 595, 120 S. W. 618.

⁴ Messenger v. Northcutt, 26 Colo. 527, 529, 58 Pac. 1090; Knight v. Boring, 38 Colo. 153, 87 Pac. 1078, 1080.

⁵ Price v. Greer, 89 Ark. 300, 116 S. W. 676, 677, 118 S. W. 1009.

⁶ Lemon v. Hubbard, 10 Cal. App. 471, 102 Pac. 554, 556.

⁷ Lottman v. Barnett, 62 Mo. 159; Rippee v. Kansas City, Ft. S.

& M. R. Co., 154 Mo. 358, 55 S. W. 438; Schwab Clothing Co. v. St. Louis, I. M. & S. R. Co., 71 Mo. App. 241; Farmington, City of, v. Farmington Tel. Co., 135 Mo. App. 697, 116 S. W. 485, 487.

⁸ Jones v. Whitney, 136 Mo. App. 683, 118 S. W. 1180, 1182.

¹ See, ante, § 1200.

² Stipulation granting leave to file an amended complaint, and acknowledging service. — See Jury's Adjudicated Forms of Pleading and Practice, vol. I, p. 101. Form No. 72.

subsequent amendments must be made on notice,³ with leave of the court first duly obtained and an order to that effect entered.⁴ Where a demurrer to a complaint is sustained on the ground of uncertainty,⁵ and such uncertainty may be entirely removed by parol evidence, it is an abuse of the court's discretion to deny the pleader leave to amend.⁶ The sustaining of a demurrer is not a prerequisite to the amendment of a complaint; it may be amended on motion of the plaintiff in any regard,⁷ within the rule as to the amendment of pleadings.⁸ Thus, an amendment to a complaint setting up nondelivery of a deed where the main contention was that, although the deed was void for want of delivery, it was valid as a will, has been held to be permissible, and hence the granting of leave to so amend is not error upon the part of the trial court.⁹

§ 1205. **AMENDING ANSWER.** The rule as to the amendment of an answer is the same as to the amendment of a complaint,¹ being provided for by the same section of the procedural code,² with the exception that an amendment to an answer may be allowed for the purpose of setting up a new or an additional defense;—e. g., the statute of limitations,³—which goes to bar the plaintiff's right of

³ Notice of Motion for leave to amend.—See *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 101, Form No. 73.

Notice of filing amended pleading.—*Id.*, Form No. 74.

Notice to reopen cause and for leave to file amended pleading.—See *Id.*, p. 102, Form No. 76.

Admission of service of amended pleading.—*Id.*, p. 103, Form No. 78.

⁴ Order granting leave to amend a pleading.—See *Jury's Adjudicated Forms of Pleading and*

Practice, vol. I, p. 103, Form No. 77.

⁵ As to demurrer on ground of uncertainty of complaint, see, ante, §§ 1010-1022.

⁶ *Eddy v. American Amusement Co.*, 9 Cal. App. 624, 99 Pac. 1115, 1116.

⁷ See, post, §§ 1206-1209.

⁸ See, ante, § 1203.

⁹ *Dexter v. Witte*, 138 Wis. 74, 119 N. W. 891.

¹ See, ante, § 1204.

² See, ante, § 1200.

³ See, ante, § 1099, authorities in footnote 3.

action.⁴ The administration of the law requires that a policy of liberality be pursued in the allowance of amendments that are in furtherance of justice. This is particularly true of permitting amendments to answers. Ordinarily, the plaintiff may discontinue his action and begin over, if the right of amendment is denied, while the defendant is without remedy if leave to amend is refused. Upon this principle, where material matter is omitted from an answer by mistake or inadvertence, an amendment should be allowed.⁵ It has been held to be an abuse of discretion to refuse to permit a defendant to amend his answer by striking therefrom an admission improvidently made.⁶ A decision of the court in permitting or refusing to permit an answer to be amended after the case has been referred and the findings of the referee filed can not be reversed, unless, under all the circumstances, the effect would be to allow plaintiff to succeed on a technical point which would have been determined against him without prejudice to his substantial rights and in aid of the justice of the case.⁷

§ 1206. AMENDING PRAYER. Although the prayer is not a part of the complaint, or of the answer, when the answer is required to have a prayer,¹ that is, not in the sense at least that it is necessary to or aidful in stating a cause of action or defense,—although it has been held to help out a defective plea in cross-complaint, and to justify the court in bringing in new parties,²—yet it is capable of amendment, the same as any other part of the pleading,

⁴ As to pleas in bar, see, ante, § 1096.

⁵ Gregory v. Hart, 7 Wis. 532; Villas v. Mason, 25 Wis. 310; Carmichael v. Argard, 52 Wis. 607, 610, 9 N. W. 470; Thorn v. Smith, 71 Wis. 18, 24, 36 N. W. 707; Palmer v. Schultz, 138 Wis. 455, 120 N. W. 348.

⁶ Hepp v. Heufner, 61 Wis. 148, 20 N. W. 923.

⁷ See: Henderson v. Henderson, 55 Mo. 534; Ensworth v. Barton, 67 Mo. 622; Joyce v. Grownay, 154 Mo. 253, 55 S. W. 466; Freasier v. Harrison, 137 Mo. App. 375, 118 S. W. 108.

¹ As to prayer to answer, see, ante, § 1177.

² See, ante, §§ 1192-1198.

under the code rule. And it has been said that the trial court does not err in permitting the filing of an amendment to the pleadings after the testimony had been taken, and before final submission, where no new facts were charged in the amendment filed, no new issues tendered, and no additional testimony adduced, the amendment simply presenting a change in the prayer from a claim for separate maintenance to one for absolute divorce.³ An amendment to a complaint or petition in equity, by adding to the prayer for relief a request for a money judgment, where such amendment made no change in the issues, and called for no relief which could not properly have been awarded without it, may be permitted, and it is not error to overrule a motion to strike out such amendment.⁴

§ 1207. AMENDING AS TO DAMAGES — COMPLAINT OR PRAYER. A complaint may be amended as to claim for damages, either by omitting an element of damage claimed in the original petition, or alleging another element of damage which is included within the terms of the original petition, but which was not specifically claimed.¹ Thus it has been held that the trial court, in permitting an amendment to the plaintiff's complaint during the trial and after the close of plaintiff's case, whereby the demand in the complaint as damages was changed from two thousand dollars to six thousand dollars, is acting within its discretion, and injury is not shown where the verdict was for no more than the original amount claimed.² Additional damages arising out of a tort, which is alleged in the petition, may be stated by way of amendment.³ Where a petition

³ *Burke v. Burke*, 142 Iowa 206, 119 N. W. 129, 130.

⁴ *Johnson v. Carter*, 143 Iowa 95, 120 N. W. 320, 322.

¹ *Texas & N. O. R. Co. v. Gross*, 60 Tex. Civ. App. 621, 128 S. W. 1173, 1175.

² *Dempster v. Oregon Short Line R. Co.*, 37 Mont. 335, 96 Pac. 717,

718. See: *Wormall v. Reins*, 1 Mont. 627; *Palmer v. McMasters*, 6 Mont. 169, 9 Pac. 898; *Borden v. Lynch*, 34 Mont. 503, 87 Pac. 609.

³ *Benson v. Ottumwa, City of*, 143 Iowa 349, 121 N. W. 1065. See: *Taylor v. Taylor*, 110 Iowa 207, 81 N. W. 412; *Van Patten v. Waugh*, 122 Iowa 302, 98 N. W. 119; *Little*

is amended by striking out the prayer for three thousand dollars special damages, and by making the prayer for general damages eighteen thousand dollars, instead of fifteen thousand dollars, thereby making no change in the whole amount of damages; held, that it was competent for the court to permit the amendment, and that there was no substitution of a new cause of action.⁴ Anything necessary to be alleged in order to perfect something that is insufficiently pleaded is the office of an amendment. Under this principle, where an original petition alleges a statute of another state, but only in reference to the right to recover by survival the damages suffered by the deceased, this allegation may be properly amended so as to include forms of damage, first, for pecuniary loss sustained by the plaintiffs (parents) from the son's death, and, second, damages which the deceased himself suffered, as surviving to plaintiffs as heirs.⁵

§ 1208. AMENDING TO CONFORM TO PROOF. A pleading may be amended, on notice,¹ to conform its allegations to the proof as introduced on the trial.² It is the duty of the trial court after submission, to direct an amendment to a pleading to conform to the proofs, where such amendment is necessary to prevent a mistrial.³ When testimony

v. Pottawattamie County, 127 Iowa 376, 101 N. W. 752; *Gordon v. Chicago, R. I. & P. R. Co.*, 129 Iowa 747, 106 N. W. 177; *Palmer v. Waterloo, City of*, 138 Iowa 296, 115 N. W. 1017; *Woods v. Lisbon, Incorporated Town of*, 138 Iowa 402, 128 Am. St. Rep. 208, 16 L. R. A. (N. S.) 886, 116 N. W. 143.

⁴ *Cotner v. St. Louis & S. F. R. Co.*, 220 Mo. 284, 119 S. W. 610, 615.

⁵ *Texas & N. O. R. Co. v. Gross*, 66 Tex. Civ. App. 621, 128 S. W. 1173.

¹ As to notice of motion to reopen cause and for leave to file amended pleading to conform to proof. — See *Jury's Adjudicated Forms of Pleading and Practice*, vol. I, p. 102, Form No. 75.

² *Brooklyn Creamery Co. v. Friday*, 137 Wis. 461, 119 N. W. 126, 127. See: *Post v. Campbell*, 110 Wis. 378, 85 N. W. 1032; *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55; *Kersten v. Welchman*, 135 Wis. 1, 114 N. W. 499, 500.

³ *Hancock v. Board of Education*, 140 Cal. 554, 74 Pac. 44; *Hedstrom v. Union Trust Co.*, 7

is introduced without objection, upon an issue not specially raised by the pleadings, the court should treat the pleadings as amended so as to correspond with the proof, or may permit an amendment of the pleadings to be made.⁴ An amendment will in no case be permitted in order to make the pleadings conform to the proof, when the evidence tending to establish the matter with reference to which the amendment is sought has been admitted over objection.⁵

§ 1209. REFUSING LEAVE TO AMEND. We have already seen that while the procedural codes favor amendments to pleadings, in furtherance of justice, and that amendments should be dealt with liberally by the trial courts, yet the matter of granting or refusing leave to amend rests in the sound discretion of the trial judge.¹ The trial court does not abuse its discretion in refusing an amendment to the pleadings where such amendment would institute a new trial of the case on new issues, with a shifting of the burden of proof.² Applications to amend a pleading so as to assert a dilatory plea do not meet with the same favor by the courts as amendments interposing defenses which go to the merits of the controversy.³ There is no abuse of discretion in refusing an amendment in which it is sought to present issues entirely new, and where there is no showing of a substantial reason for delay in presenting the facts alleged in the proposed amendment.⁴ In

Cal. App. 278, 94 Pac. 386; *Myers v. Holton*, 9 Cal. App. 114, 98 Pac. 197.

⁴ *Sorrels v. Self*, 43 Ark. 451; *Davis v. Goodman*, 62 Ark. 262, 35 S. W. 231; *Nicklance v. Dickerson*, 65 Ark. 422, 46 S. W. 945; *Roach v. Richardson*, 84 Ark. 37, 104 S. W. 538; *Wrought Iron R. Co. v. Young*, 85 Ark. 217, 107 S. W. 674; *St. Louis, I. M. & S. R. Co. v. Holmes*, 88 Ark. 181, 114 S. W. 221, 222.

⁵ *Leggat v. Palmer*, 39 Mont. 302, 102 Pac. 327, 329; *Mendenhall v. Harrisburg Water Co.*, 27 Ore. 38, 39 Pac. 399.

¹ See, ante, § 1199.

² *Gerber v. Gerber*, 52 Wash. 253, 100 Pac. 735.

³ *Tingly v. Times-Mirror Co.*, 151 Cal. 1, 89 Pac. 1097, 1102.

⁴ See: *First National Bank v. How*, 1 Mont. 604; *State Savings Bank v. Albertson*, 39 Mont. 414, 102 Pac. 692, 695.

those cases in which the application is not in furtherance of justice, it should be denied. Under this rule, where an appellant instituted its action and attached the property of the respondents at a time when it had no substantial right against them, and the application for leave to amend was not made until after the court had discharged the jury at the close of the trial, it can not be said that the court abused the discretion vested in it by law by refusing to grant such application.⁵ A motion to strike out is proper against portions of an amended petition which have no material relation thereto.⁶ The court may refuse to allow an amended answer on the eve of the submission of the case on the evidence where such amendment substantially changes the nature of the defense.⁷

§ 1210. PROCEDURE UPON AMENDING COMPLAINT—CALIFORNIA PRACTICE. Under the California procedural code, if the complaint is amended, a copy of the amendments must be filed, or the court may, in its discretion, require the complaint as amended, to be filed, and a copy of the amendments or amended complaint, must be served upon the defendants affected thereby. The defendant must answer the amendments, or the complaint as amended, within ten days after service thereof, or such other time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases.¹ The rule as to plaintiff's right to demur, applies to an amended complaint the same as to an original complaint; and the rule as to default will be the same in both cases, except only as to time when default may be taken.

⁵ International Development Co. v. Clemans, 59 Wash. 398, 109 Pac. 1034.

⁶ Grand River, Town of, v. Switzer, 143 Iowa 9, 121 N. W. 516, 518.

⁷ Harrison's Admr. v. Hasting,

28 Mo. 346; Clark v. Transfer Co., 127 Mo. 270, 30 S. W. 121; Laughlin v. Leigh, 226 Mo. 620, 126 S. W. 743; Bank v. Goldsoll, 8 Mo. App. 595.

¹ Kerr's Cyc. Cal. Code Civ.

Proc., § 432.

§ 1211. — DEMURRER TO AMENDED COMPLAINT. In those cases in which a demurrer is filed to an amended complaint it is thought to reach the defects only in the pleading against which it was lodged; not those in an abandoned pleading. Under this principle a demurrer to an amended petition can not relate back to the alleged invalidity of the original petition; nor can the court look at the original petition to determine whether the demurrer to the amended petition should be sustained.¹

After demurrer sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision or order.²

¹ Farmington, City of, v. Farmington Tel. Co., 135 Mo. App. 697, 116 S. W. 485, 487.

² Kerr's Cyc. Cal. Code Civ. Proc., § 476.

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